

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Docket No. AB 167 (Sub-No. 1094)A

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CHELSEA PROPERTY OWNERS -- ABANDONMENT -- PORTION OF THE
CONSOLIDATED RAIL CORPORATION'S WEST 30TH STREET SECONDARY
TRACK IN NEW YORK, NEW YORK

REPLY OF
THE CITY OF NEW YORK, NY, TO
(1) MOTION OF 511 WEST 23RD STREET ASSOCIATES, LLC FOR LEAVE TO
INTERVENE AND
(2) REPLY OF 511 WEST 23RD STREET ASSOCIATES, LLC TO
CITU REQUEST IN SUPPORT OF
ADVERSE ABANDONMENT PROCEEDING

The City of New York, NY ("the City"), hereby submits this reply to two pleadings submitted by 511 West 23rd Street Associates ("511"): (1) a Notice of Motion to Intervene ("*511 Intervention*"); and (2) the Reply to the CITU Request in Further Support of Adverse Abandonment Proceeding ("*511 Reply*")¹. If the Board grants 511's Motion for Leave to Intervene, no further time for filing additional pleadings should be permitted. The *511 Reply* already presents argument with respect to a number of issues related to the requests for a CITU in this proceeding, well beyond the time that persons affected by those requests should have submitted any comments. The arguments 511 presents do not provide any basis for this Board to deny the requests for a CITU, and the CITU should therefore be issued promptly.

¹ The City is today filing a Motion for Leave to File a Reply to the second of these on the ground that it raises a number of issues that have not been fully briefed in this proceeding. In anticipation of a favorable ruling on this Motion, the City is including its reply in this same document.

negotiations, discussions and planning take this premise as a given, and the transactional arrangements, to the extent of their progress, satisfy and will continue to satisfy that requirement.

Id. at 2, para. 5.

Another project that would possibly impact the current High Line structure involves the western portion of Caemmerer Rail Yard lying between Eleventh Avenue and Twelfth Avenue and between 30th and 33rd Street (the “WRY”), which will contain the proposed sports facility and convention center (the New York Sports and Convention Center (“NYSCC”) (see map attached to *Ricks Affidavit* as Exhibit 1). In all of the discussions about this project with the various state agencies, with the New York Jets and with others, the City, and the Railroads as well, have been adamant that the retention of easements and the design of all structures be completed in a way that will permit reconstruction of the High Line corridor for reactivation as a freight line, if necessary. *Ricks Affidavit* at 3 - 5, paras. 9 – 16. Mr. Ricks explains that, no matter how the WRY and ERY developments occur, the City and ESDC will retain the rights necessary to implement restoration of the High Line and that “[I]n any event, the City is generally willing to assume the cost of reconstructing the rail viaduct within the new easement area, including the modification of any structure which may lie within the easement area.” *Id.* at 5, para. 15.

1. A Change in the Existing High Line Right-of-Way or a Relocation of the Easement, If Either Occurs, Would Not Invalidate the CITU.

Changes to the infrastructure in a rail-banked corridor are inevitable. The regulations do not require preservation of every aspect of the existing structure. Rather, they reflect an understanding of the reality that CITU proponents envision a use that does not require the extensive infrastructure required to run a railroad. The key question, though, is whether a

CITU proponent will be able to fully restore the corridor to use for rail service at the appropriate time. The City and ESDC have that ability.

The Trails Act clearly recognizes that changes to the structure will occur. It refers specifically to “restoration or reconstruction for railroad purposes” of a track that would otherwise be abandoned, in the event that a CITU is discontinued. 16 U.S.C. §1247(d) (emphasis supplied).

The applicable regulations also acknowledge that interim trail use is appropriate where the use is consistent with the restoration of rail service in the future. Here, there is no question but that any changes to the infrastructure that may occur will not create an impediment to a railroad’s ability to restore rail service in appropriate circumstances. When adopting the interim trail use regulations now codified at 49 C.F.R. §1152.29, the I.C.C. stated the following:

... [W]e see no reason why the development of non-trail activities or structures on or around the right-of-way should be restricted, as long as they are consistent with interim trail use, rail banking and future restoration of rail service. ... Any facility necessary to maintain the integrity of the corridor and rail bank must be preserved consistent with the purposes of the abandonment.

Rail Abandonments, 2 I.C.C. 2d at 608.

The General Project Plan adopted by the ESDC for the NYSCC Land Use Improvement Project and Civic Project on November 4, 2004 (a copy of which is attached to the *Ricks Affidavit* as Exhibit 2), confirms that even if a portion of the current High Line structure is removed or altered as part of the development of the WRY, the facility required - - that is, the property rights that will permit “restoration or reconstruction for railroad purposes,” 16 U.S.C. 1247(d) - - to restore the rail facility is an integral part of the plans. The General Project Plan states the following, at 13:

The High Line structure within the Project Site is located within an easement granted, or to be granted, to the Consolidated Railroad Corporation. It is expected that ESDC or a subsidiary of ESDC, MTA and other parties will enter into agreements with the Consolidated Railroad Corporation and other parties in furtherance of the High Line project to, among other things, (i) allow for the removal of the High Line structure within the Project Site; (ii) provide for a relocation of the existing easement, which now runs between 30th Street and 33rd Street, within the Project Site, to permit the development of the NYSCC and (iii) provide for the future restoration of freight service along the relocated easement if mandated by the federal Surface Transportation Board.

The *Ricks Affidavit* similarly emphasizes the importance of preserving the ability of the City and ESDC, as holders of the CITU, to restore service if required. He states, for example that:

For the moment, it is not certain whether the High Line adjacent to the ERY will be rehabilitated, demolished and replaced with a platform, or simply demolished—it may depend in part on whether or not a portion of the High Line in or adjacent to the WRY is incorporated into the NYSCC or not. However, if the High Line is demolished, there are no foreseeable impediments to reconstruction. Certainly, the easements for it will remain in place.

Ricks Affidavit at 3 para. 8.

Similarly, he notes the City's emphasis on preserving the link between the High Line and the interstate rail system in the event that restoration of rail service is ever required along this corridor, stating:

With respect to the WRY, in my discussions with representatives of the New York Jets and the Convention Center Development Corporation as well as staff members of various City agencies working on the Hudson Yards project, in connection with the development of the Hudson Yards generally and the High Line particularly, I and other representatives have made clear, and such parties understand, the necessity of maintaining the viability of a connection between the High Line and the interstate rail network. The New York Jets, having primary responsibility for the design of the NYSCC, have been fully responsive to this requirement. It is my understanding, based on conversations with CCDC staff, that CCDC also accepts this premise and is willing to work with the City to assure the viability of the interstate network link. Discussions as to planning and

design of the Javits Center expansion in a manner that satisfies this requirement are just getting started.

Id. at 4, para. 12.

Clearly, the City is focused on retaining the potential for restoration of rail service, including preservation of a route to and a link with the interstate rail network with which the High Line currently connects. The City and ESDC, like every other CITU holder, recognize that if they remove the tracks or other facilities necessary to run a railroad, they bear the risk of incurring the cost of replacing them. *See Ricks Affidavit* at 5 para. 15.

Here the City's and ESDC's efforts have gone beyond the scope of effort required to preserve the corridor. The Policy Statement that the I.C.C. adopted with respect to the Trails Act and Rail Abandonments stated quite clearly that:

the legitimacy of rail banking can be presumed in every case. *** Congress did not distinguish between short- and long-term rail banking, and therefore, we do not believe that specific contingency plans for reactivation of a line are necessary to justify retention of a potentially valuable national asset. *** [T]he fact that the railroad agrees to trail use is indication in and of itself that the corridor may be valuable in the future for transportation.

F.D. No. 31717, *Iowa Power, Inc. -- Construction Exemption -- Council Bluffs, IA*, 8 I.C.C. 2d 858 (1990), *quoting Rail Abandonments -- Trails Act -- Policy Statement*, 5 I.C.C. 2d 370, 375 n.5 (1989).

In this case, the City and ESDC have recognized that changes in the existing infrastructure will be made, and are going beyond the regulatory requirements and making "specific contingency plans for reactivation" of the line should that ever be necessary. They have planned for reconstruction of the infrastructure required to run a railroad, have agreed upon the preservation of the right-of-way necessary to operate a line of railroad and to ensure the connection of that line to the interstate rail network.

A recent decision from this Board confirms that the various property owners' highly publicized plans for the properties on which the High Line easement is located do not render invalid the retention of this corridor in the "rail-banked" inventory. In STB Docket No. AB-12 (Sub-No. 148X), *Southern Pacific Trans. Co. – Abandonment Exemption – In Tyler, Jasper, and Angelina Counties, TX, slip op.*, Service Date March 9, 2004, this Board allowed the Texas Department of Transportation to vacate a NITU³ with respect to a middle section of a line that had been rail-banked 10 years earlier. The State determined that it no longer needed the middle 9 ½-mile segment of a 32.05-mile rail-banked line, and the Board permitted the partial vacation of the NITU with full abandonment of that segment. The segment that was thus disconnected from the interstate rail network remained subject to the NITU, and Texas DOT remains as the trail user for both remaining segments of the original corridor. *See also* STB Docket No. AB-406 (Sub-No.6X), *Central Kansas Ry., LLC - - Abandonment Exemption - - In Marron and McPherson Cos, KS, slip op.* (Service Date December 8, 1999) (severance of a portion of a rail line from the interstate rail system does not necessarily mean that the remaining portion of the corridor would not be available for future rail service). Texas DOT did not explain how the re-connection to the interstate network would be effected, and the Board permitted the abandonment of the intermediate segment nonetheless. The City and ESDC have made that showing. In the case of the High Line, therefore, where the easement may be relocated and where the parties have taken great pains to ensure that the means exist to re-establish the physical infrastructure required to support the restoration of rail service, the line can remain available for a CITU.

³ The Board issues a Notice of Interim Trail Use ("NITU") rather than a CITU in an exempt abandonment proceeding. 49 C.F.R. §1152.29(d).

The parties' agreements that reflect possible relocation of the easement to be used by the rail corridor also do not run afoul of the obligation to preserve the right-of-way necessary for reactivation. A rail carrier may relocate its line of railroad without the Board's prior approval, as long as the relocation does not affect service to shippers or permit the carrier to begin serving a new territory. *City of Detroit v. Canadian National Ry. Co.*, 9 I.C.C. 2d 1208, *aff'd sub nom Detroit/Wayne Co. Port Authority v. I.C.C.*, 59 F.3d 1314 (D.C. Cir. 1995). Here, the relocated line will not be more than one block away from its current route and will, if required, allow the re-started railroad to operate in the same market along essentially the same route that the High Line served throughout its history. If the Railroads can relocate this line now, while it is technically still in service, there is no reason that it cannot be relocated while its use as a rail corridor is being held in abeyance pending possible restoration.

The "facility necessary to maintain the integrity of the corridor and rail bank", *Rail Abandonments*, 2 I.C.C. 2d at 608, will be preserved by the parties' agreements. CITU holders effecting a transition from rail corridor to other public uses remove the rails, and remove other structures or elements of the rail infrastructure that would be essential to operate a train. By accepting the obligations of a CITU, they accept the obligation to restore the facility fully in the event of restoration of rail service. As the *Ricks Affidavit* explains, the City and ESDC have the mechanisms in place to restore the corridor to rail use if necessary and have taken great pains to ensure that all property owners and others who have an interest in the properties burdened by the High Line easement understand that no matter what changes they may make to those properties, they remain burdened by the potential for restoration of service.

2. There Has Been No Final, Binding Determination By The I.C.C. or By Any Court That There is No Possibility for the Return of Traffic to The High Line.

511 misapprehends the nature of the I.C.C.'s finding in 1992 that abandonment of the High Line was consistent with the public convenience and necessity. At the time, there was no traffic moving over the line and the projections that Conrail presented at the time for movement of waste were found to be unrealistic. However, nothing that the I.C.C. or the Court reviewing the I.C.C.'s decision, or that the City has said since that time, prevents the City and ESDC from seeking preservation of this corridor for possible future restoration of rail service if warranted.

When the I.C.C. in 1992 conditionally granted the adverse abandonment application, it was making a determination based on the evidence available to it at the time that the public convenience and necessity did not warrant continued operation of freight service on the line. Docket No. AB-167 (Sub-No. 1094)A, *Chelsea Property Owners - - Abandonment*, 8 I.C.C. 2D 773, 794 (1992). The issuance of a CITU does not conflict with that - - in fact, a CITU can only be issued when such a finding has been made. After the STB makes that finding, when a public party or other entity determines that it wants to preserve the corridor pursuant to the CITU regulations and that entity is willing to hold the railroad harmless from liability and tax obligations and to hold the line available for potential restoration of service as a rail corridor in the future, a CITU will issue. *See, e.g.*, STB Docket No. AB-389 (Sub- No. 1X), *Ga. Great Southern Div., S. Car. Cent. R. Co., Inc. - - Abandonment and Discontinuance Exemption*, slip op. 2003 W.L. 21132515 (ICC) (Service Date May 16, 2003), *recon. denied*, Feb. 2, 2004. The goal of the statute and regulations is to preserve dwindling rail corridors for

which a carrier has shown that continued service cannot be justified, against the day when service might be restored. 511 would impose a burden on the CITU proponent of demonstrating the likelihood of future rail traffic, a burden that no statute, regulation or case imposes.

511 goes even one step further, asserting that the decision of the D.C. Circuit in *Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706 (D.C. Cir. 1994) ("*1994 High Line Decision*") includes a legal determination that has preclusive effect under the doctrine of collateral estoppel vis-à-vis the potential for future rail traffic on the High Line. 511 argues that the *1994 High Line Decision* has determined that the restoration of rail service on the High Line was impossible. See *511 Reply* at 11. 511's argument is wrong.

The Court's finding in *1994 High Line Decision* that "there was essentially no possibility of future traffic" is a limited and narrow one. The Court reviewed the I.C.C.'s two-part analysis of the only project Conrail had proposed -- a waste-hauling project -- in its effort to forestall approval of the adverse application for abandonment of the High Line. Based on the specific and limited review of that project the Court affirmed the I.C.C.'s determination that the traffic projection was not realistic and that the public convenience and necessity permitted abandonment. *Id.* at 711. The Court of Appeals stated:

In assessing whether the public convenience and necessity permit abandonment, the ICC focuses on transportation-related factors...Generally, the Commission denies an adverse abandonment application if there is potential for future operation on the line and the carrier has taken reasonable steps to attract traffic. Here, the ICC concluded that there was essentially no possibility of future traffic on the Highline despite Conrail's efforts to attract traffic. Thus, it concluded that the public convenience and necessity permitted abandonment. **The ICC engaged in a two-part analysis of the only project Conrail ever proposed, the waste hauling project. First, it asked whether Conrail's proposed waste hauling project was practicable: could waste be loaded on and transported over the Highline? Second, the ICC asked**

whether the plan was economically feasible. *Id.* The Commission found that the plan was neither practicable nor economically feasible.

Id. (emphasis added). In evaluating the practicality and economic feasibility of the waste-hauling project, the Court noted the I.C.C.'s consideration of: 1) the "single future project proposed" by Conrail; 2) the need for Conrail to acquire land for the waste hauling project; 3) the reticence about the project by third parties alleged to be involved with the project; and 4) the offer of the property owners to indemnify Conrail for the demolition costs. *Id.* at 708. Therefore, the only determination that was made in the *1994 High Line Decision vis-à-vis* the possibility of future traffic on the Highline related to the proposed waste-hauling project and whether it was practicable and/or economically feasible. Based on this limited and narrow evaluation the I.C.C. determined that "there was essentially no possibility of future traffic on the Highline." *Id.*

511 argues that this finding collaterally estops all parties from now addressing the issue of whether the High Line should be rail-banked for possible future restoration as a rail corridor. 511 is wrong. As cited by 511, the required elements of collateral estoppel are as follows: (1) the issues of both proceedings must be identical, (2) the relevant issues were actually litigated and decided in a prior proceeding, (3) there must have been 'full and fair opportunity' for the litigation of the issues in the prior proceeding, and (4) the issues were necessary to support a valid and final judgment on the merits. *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 646 (2d Cir. 1998).

A review of and application of these factors here demonstrates that 511's attempt to stop the CITU by alleging collateral estoppel must fail. First, the pertinent issue in the *1994 High Line Decision* involved the practicality and feasibility of Conrail's proposed waste-hauling project and Conrail's ability to attract future traffic based on the waste-hauling project. That is not the issue here. The issue here is whether the line should be banked for possible future use in

case any party seeks restoration of service over this line in the future and used for other purposes in the interim. Second, because the traffic-potential issue decided in the *1994 High Line Decision* turned on the practicality and feasibility of Conrail's proposed waste-hauling project, the issue before the Board at this time of holding the corridor available for future restoration was not "actually litigated and decided." Third, again because of the limited nature of the issues decided previously in this proceeding, there was not a "full and fair opportunity for the litigation of the issues" pertinent to a request for a CITU. Fourth, neither the *1994 High Line Decision* nor the I.C.C.'s decision that it reviewed constituted a "valid and final judgment on the merits." An abandonment decision is only final when the approved abandonment has been fully consummated. 49 C.F.R. §1152.29(e)(2). That did not occur here.

511's unsuccessful attempt to assert that the City and ESDC are collaterally estopped by the previous decisions at the ICC and on appeal, may have meant to assert that the law of the case vested the *1994 High Line Decision* with preclusive effect. This argument would also fail. The law of the case doctrine is the application "of previous orders on the later action of the court rendering them in the same case, [and] merely expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436 (1912).

The law of the case doctrine provides that a decision "on a **legal issue** must be followed in all subsequent proceedings in the same case." *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir. 1996) (emphasis added). "[F]or the doctrine to apply, the issue in question must have been decided explicitly or by necessary implication in [the] previous disposition. A significant corollary to the doctrine is that dicta have no preclusive effect." *Rebel Oil Co. v.*

Atlantic Richfield Co., 146 F.3d 1088, 1093 (9th Cir. 1998) citing *Milgard Tempering, Inc. v. Selas Corp.*, 902 F.2d 703, 715 (9th Cir. 1990).

In the 1994 *High Line Decision* the issue that was “explicitly decided” was that the impracticality and lack of feasibility of Conrail’s proposed waste hauling project did not justify a conclusion that there was a sufficient likelihood of potential future traffic on the High Line to warrant denying the abandonment. Neither the earlier decision at the I.C.C. nor the decision of the D.C. Circuit, therefore, would preclude consideration, at this point, of the possibility of future traffic on the High Line.

3. 511’s Remaining Attempts to Challenge the Validity of the CITU Are No More Successful.

511 erroneously relies, in para. 37 of the *511 Reply*, on a section of an old draft of the proposed Trail Use Agreement for the proposition that the parties have no intent to restore rail service. However, the current draft of the Trail Use Agreement clearly reflects the parties’ recognition that restoration of rail service could occur. The version of Section 2(c) to which 511 refers represents the City’s and the railroads’ acknowledgement that if, for example, there is a default under the Trail Use Agreement or if any other circumstance occurs in the future that causes the City to decide to surrender the CITU and no other party comes forward to assume that responsibility, an abandonment order will likely follow. If the parties comply with the requirements of 49 C.F.R. §1152.29(d)(2), the CITU is vacated and the underlying rail corridor is considered approved for abandonment. *See Norfolk & W. Ry. Co. – Abandonment Between St. Mary’s and Minister in Auglaize Co., OH*, 9 I.C.C. 2d 1015. 1993 ICC Lexis 209 at *3 (where a trail user terminates the trail use by sending a copy of the CITU and asking that it be vacated on a date certain, the STB will reopen the abandonment, vacate the CITU and issue an abandonment certificate). In that circumstance, Section 2(c) would describe the parties’ obligations.

However, and contrary to 511's characterization of the parties' intent, the *Ricks Affidavit* and the current version of the Trail Use Agreement that is attached to that Affidavit as Exhibit 4, confirm that the City and ESDC continue to insist that the arrangements for restoration of rail service be agreed upon now.

511 raises the "no intent to restore service" point again in Section 59. *511 Reply* at 17, para. 59. Here again, 511 relies on the same section of the superseded draft Trail Use Agreement for the proposition that Conrail has no intention of restoring rail service. As noted previously, the City has taken great pains to ensure that rail service can be restored. Moreover, there is no requirement that Conrail be the railroad that restores service. In *Norfolk and W. Ry. Co. - Abandonment*, *supra*, another carrier besides the one that was the original operator of the line subject to a CITU sought restoration of service on a portion of the rail-banked line. In that circumstance, the I.C.C. sought the concurrence of the initial abandoning carrier, but upon receipt of the appropriate applications for authority to operate a rail line pursuant to 49 C.F.R. Part 1150, permitted another railroad to restore service on that portion. The CITU was vacated and rail service over the line was restored, albeit by a different carrier. *Id.* at *9 - *10. *See also, Iowa Power, supra.*

511 also suggests that the City's plans to relocate the easement on a platform over Route 9A (the West Side Highway) in the event that the projects contemplated north of 30th Street come to fruition are not feasible. *511 Reply* at 9 para. 35. This, similarly, is without foundation. As Mr. Ricks points out, there is no impediment to operating a rail line over a viaduct over a public street. The current High Line structure crosses several streets. Moreover, "there are numerous (commuter) elevated rail viaducts located throughout the City of New York...." *Ricks Affidavit* at 5, para. 16.

In short, 511's attempts to find fault with the City's and ESDC's comprehensive plans for interim use of the High Line must all fail.⁴ The City's plans are within the ambit of the regulations and the intent of the statute.

B. A CITU is Available to Parties in an Adverse Abandonment Proceeding As in Any Other Abandonment Proceeding.

Neither the applicable regulations, nor the statute, nor the arguments advanced by opponents of the request for a CITU provide any basis to conclude that a CITU is not available in an adverse abandonment proceeding. The City, now joined by ESDC, has followed the course set out by the regulations of securing the agreement of the railroads to negotiating a trail use agreement. Both the City and ESDC have made the representations required by the regulations for trail use applicants. Nothing more is required for this Board to issue the CITU.

The regulations that the I.C.C. adopted to implement the 1983 amendments to the National Trails System Act⁵ apply to all abandonments filed under sections 10903 and 10904 of title 49. *Rail Abandonments – Use of Rights-of-Way as Trails (49 CFR Parts 1105 and 1152)*, 2 I.C.C. 2d 591, 600 (1986) ("*Rail Abandonments*"). The I.C.C. specifically concluded that the amendment to provide for rail banking of lines for use as trails applies to §§10903-10904 proceedings, as well as to proceedings that have been exempted from the Board's regulations under (former) 49 U.S.C. 10505 (recodified to 49 U.S.C. §10502) and to abandonments

⁴ 511 also argues in paragraphs 41-44 that the position the City took in earlier litigation over the requirements of the Uniform Land Use Review Procedure ("ULURP") is inconsistent with the position here. The City argued there that no "ULURP" review was required where the City was accepting a surrender of easement that it had previously granted; *i.e.*, the acceptance of a surrender of an easement previously granted by the City is not an "acquisition" within the meaning of ULURP. 511 admits that the issue in the State proceeding was whether the extinguishment of easements required ULURP review. The current ULURP is for the City's acquisition of railroad easements over private properties, which the City considers to be an "acquisition" for purposes of ULURP. There is no inconsistency, nor is this issue relevant to any issue before the Board in this proceeding.

⁵ Pub. L. 98-11, §208, 97 Stat. 42, 48 (March 28, 1983), codified at 16 U.S.C. §1247(d).

implemented by Conrail under the Northeast Rail Services Act of 1981⁶. *Id.* The only type of abandonment to which it does not apply is a case involving a line of a bankrupt railroad - - not the situation presented here.

The STB, like the I.C.C. before it, has been quite clear that the only difference between adverse abandonments and those brought by the railroad itself is the identity of the applicant or proponent. Otherwise, the proceedings are the same - - they are governed by the same statutory standard – the public convenience and necessity standard of §10903 - and the same regulations govern the proceeding. *See, e.g.,* STB Docket No. AB-33 (Sub-No. 183), *Salt Lake City Corp. - - Adverse Abandonment - - In Salt Lake City, UT, slip op.*, Service Date March 8, 2002.⁷ Thus, an adverse abandonment is like any other application filed under §10903, and it is included in the range of proceedings in which a CITU might be issued.

C. No Additional Time and No Additional Pleadings Are Required at this Time.

511 attempts to portray itself as a party that has been abandoned by its representative suddenly and without notice, and attempts further to suggest that the lack of direct, individual notice of the request for a CITU to 511 undercuts the validity of that request. The City does not object to 511's intervention in this proceeding at this time since, in fact, the party that has been its representative since the beginning has now withdrawn its objections. However, the City does object to 511's request for the opportunity to present further argument. No additional pleadings are required or appropriate at this time.

The question of the right of 511 and the other individual property owners to direct notice of the CITU (*see 511 Reply* at 22 para. 67) has been asked and answered long ago by the

⁶ Pub L. 97-35, Title XI, 95 Stat. 357 (Aug. 13, 1981).

⁷ As in any abandonment case, the Board can and will waive particular informational requirements of the otherwise applicable regulations upon a showing of good cause. *E.g.,* STB Docket No. AB-549, *City of Rochelle, IL - - Adverse Discontinuance Rochelle R. Co., slip op.*, Service Date May 27, 1999.

I.C.C. The D.C. Circuit has explained that the rules adopted by the I.C.C. to implement the Trails Act amendments that provide for conversion of about-to-be abandoned rail lines did not provide for individual notice to the holders of reversionary interests in property encumbered by a rail line easement that was about to be converted to a trail, and that the rules do not require such notice today. *National Ass'n of Reversionary Property Owners v. S.T.B.*, 158 F.3d 135, 139 (D.C. Cir. 1998) ("*Reversionary Property Owners*"). The I.C.C. had earlier explained its reasoning for deciding not to require such individual notice as follows:

...NARPO's alleged notice deficiency was not a real problem because of the already available notice mechanisms, "abundant local publicity about trail proposals" and frequent local public hearings, and that "any requirement to identify, locate and notify reversionary interest holders – individually or through a general published notice – would be a time consuming expensive and burdensome task." ...[citation omitted]

Id. At the time, no party sought judicial review of the I.C.C.'s decision not to require such individual notice. In *Reversionary Property Owners*, the D.C. Circuit declined to review that rule on procedural grounds, *id.* at 146, and the rule that individual notice is not required and the rationale for that rule stands. 511's due process challenge to the notice that the City provided must fail.

So too must its request for additional time based on the decision by CPO to withdraw its opposition. 511 cannot claim that it did not know of the request for a CITU, or that it did not have sufficient time to prepare arguments. In a public notice published on June 4, 2003, this Board specifically advised the public that the City

has asked the Board ... to issue a certificate of interim trail use (CITU) in this case. A CITU would permit the City to negotiate with Conrail to preserve, i.e., "rail bank" the Highline pending the viaduct's possible future restoration to rail service. Conrail and CSX have asked the Board to determine whether it has the authority to issue a CITU in these circumstances.

Docket No. AB 167 (Sub-No. 1094)A, *Order*, 68 Fed. Reg. 34696 (Service Date June 4, 2003).

This order provides official public notice both of the City's request for a CITU,⁸ and of the questions raised about the Board's authority to enter it.

This Board followed with a decision on July 17, 2003 that provided the order of speakers for the hearing to be held on July 24. At the hearing, the Board asked for briefs on the issues raised at that July 24 hearing, and a subsequent order served on July 29, 2003 confirmed that the Board wanted the parties to brief the question whether a CITU was available in an adverse abandonment proceeding. *See* Docket No. AB-167 (Sub-No. 1094)A, Order, Service Date July 29, 2003. The availability of an opportunity to file a brief on the several issues about which 511 now wishes to opine has not been held secret by this Board.

Nor have the parties held in confidence the possibility in recent months that CPO might be resolving its differences with the City and the other parties and withdrawing from the field of battle. Since October 7, 2004, when it first requested an extension of the date for replying to the September 22 Supplemental Statement, CPO has been quite clear that it sought the extension because it was negotiating a settlement of its disputes with the various parties. In an order served in this proceeding on October 8, 2004, the Board confirmed that the reason CPO sought the extension was to "give the City and CPO additional time to negotiate a full settlement." Docket No. AB-167 (Sub-No. 1094)A, Decision, Service Date October 8, 2004. CPO repeated those statements in subsequent requests for an extension (*see Motions for Extension of Time* filed in this proceeding by CPO on October 28, 2004, December 1, 2004, and December 11, 2004. 511 has had the opportunity ever since first public notice on October 8 that

⁸ As predicted by the D.C. Circuit in *Reversionary Property Owners*, there has been ample publicity about the proposed CITU. *E.g.*, "On West Side, Rail Plan is Up and Walking," New York Times (www.nytimes.com), Dec. 22, 2002; "Move to Reclaim Rail Line Receives Bipartisan Push," New York Times, page B3, July 25, 2003; "City Unveils Plans to Turn Old Rail Line Into a Park," New York Times (www.nytimes.com), Sept. 25, 2003.

CPO was in serious discussions aimed at “negotiating a full settlement” to work on pleadings necessary to protect its individual interests. No further time is required.

D. There Has Been No Inappropriate “Collusion” Between the City and the Railroads.

511’s attempt to find some “collusion” between the City and the railroads (*see 511 Reply* at 21 paras. 68 and 69) in bringing this project to fruition overlooks one of the key elements of the regulations that apply to this transaction just as to any other abandonment. That is, the owning railroad - - here, Conrail originally and now CSX as well - - must be willing to enter into negotiation of a trail use agreement with the CITU proponent - - here, the City (now joined by ESDC).

In a situation like this one where the request for a CITU is filed late but with the showing of good cause that is required by the regulations, the Board will not even begin to entertain the request until the railroad indicates that it is willing to enter into those discussions. 49 C.F.R. §1152.29(e)(1). Without discussion by the parties of the issues that must be addressed to make the CITU work, there can be no CITU. The discussions that the City and the Railroads have had are fully consistent with the intent and the requirements of the regulations - - they have been aimed at assuring the railroad that it would not incur the risks and liabilities that a railroad faces when it owns property that it is not using currently to provide freight service and that will be used by others for a public purpose (other than rail transportation) while awaiting a request for reactivation of a line as a railroad. There has been no collusion here - - compliance with applicable regulations, yes; collusion, no.

III. CONCLUSION

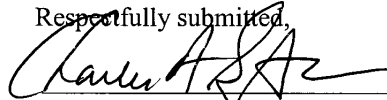
511 has presented no valid reason for this Board to deny the request for a CITU. The City and ESDC have made the representations required by 49 C.F.R. §1152.29(a)(2), (3). The

Railroads have agreed to enter into discussions of a Trail Use Agreement with the proponents.

The proponents are going to great lengths to ensure that, even if changes to the High Line infrastructure are made, the interested parties will be required to ensure the capability for restoration of rail service that includes a connection of the corridor to the interstate rail system. Neither 511 nor any other party has presented any reason that the CITU should not be issued.

WHEREFORE, and in view of all of the foregoing and of all of the pleadings submitted in this proceeding as of this date, the City hereby respectfully requests the Board to issue a CITU in this proceeding.

Respectfully submitted,



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Counsel for the City of New York, NY

Dated: January 6, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2005, a copy of the foregoing REPLY OF THE CITY OF NEW YORK, NY TO (1) MOTION OF 511 WEST 23RD STREET ASSOCIATES LLC FOR LEAVE TO INTERVENE AND (2) REPLY OF 511 WEST 23RD STREET ASSOCIATES, LLC TO CITU REQUEST IN SUPPORT OF ADVERSE ABANDONMENT PROCEEDING was served by first class mail, postage prepaid, upon:

| | |
|---|-----------------------------|
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| John F. Guinan New York Department of Transportation Albany, NY 12232 | NYDOT |
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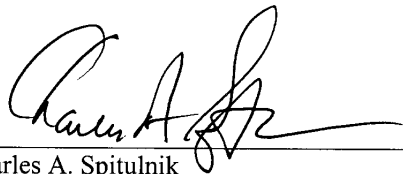
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Charles A. Spitulnik

A

City of New York)
) ss:
State of New York)

AFFIDAVIT OF MARC RICKS

1. I am a Senior Policy Advisor in the Office of the Deputy Mayor for Economic Development and Rebuilding (the “Deputy Mayor’s Office”) of The City of New York (the “City”). I make this affidavit in support of the City’s reply to the reply of by 511 W.23rd St. Associates, LLC in the captioned proceeding.

2. I make this affidavit based upon records available to me and attorneys for the City and my understandings based upon my day to day involvement with the High Line Rail Viaduct and the Hudson Yards project on behalf of the City, including information provided to me by staff members in various City agencies.

3. In the course of my duties I am assigned to the High Line project and to the Hudson Yards project (the High Line traverses a portion of the Hudson Yards). I became involved with the High Line and the Hudson Yards project in about March 2004, replacing Laurel Blatchford, formerly of the Deputy Mayor’s Office.

4. The Board is certainly familiar with the High Line project and thus no elaboration is needed here. The Hudson Yards project is a master plan for the redevelopment of the far west side of Midtown Manhattan, which plan includes the Caemmerer Rail Yard owned by the Metropolitan Transportation Authority between Tenth and Eleventh Avenues and between 30th and 33rd Streets (being the portion of the rail yard lying east of Eleventh Avenue (the “ERY”)). Among other things, the plan proposes zoning changes to promote the development of the air space over the ERY for residential, commercial and recreational purposes, as well as to maintain

the provision of below-grade facilities for the Metropolitan Transportation Authority (including the Long Island Rail Road) in the existing rail yard.

5. In the course of my work on the High Line and the Hudson Yards projects, counsel to the City, both at the City's Law Department and the City special STB counsel, have advised me as to the necessity of maintaining the viability of a connection between the High Line Railway Viaduct and the interstate rail network, which connection lies on the north side of the MTA's Caemmerer Rail Yard on West 34th Street, in order for the High Line to qualify for the issuance of a Certificate of Interim Trail Use ("CITU"). The City accepts that the High Line must remain capable, legally and practically, of connecting with the interstate rail network. All the negotiations, discussions and planning take this premise as a given, and the transactional arrangements, to the extent of their progress, satisfy such requirement and will continue to satisfy such requirement.

6. For planning purposes, the Hudson Yards project is concerned with the ERY (as indicated in par. 4 above). In addition the western portion of Caemmerer Rail Yard lying between Eleventh Avenue and Twelfth Avenue and between 30th and 33rd Street (the "WRY") would contain the proposed sports facility and convention center (the New York Sports and Convention Center ("NYSCC")) (*see* map attached hereto as Exhibit 1). The zoning allows for the ERY to be developed with residential and commercial improvements, to be constructed on a platform to be built over the ERY.

7. The segment of the High Line east of Eleventh Avenue is located immediately adjacent to the ERY. This segment of the High Line runs over an existing building and *not* over the ERY. While a platform over the ERY is planned, its location would not impact the High Line. There is

a significant new open space planned for the ERY site that would terrace up to and connect with the High Line. Nothing, however, on the ERY site would preclude the future restoration of freight rail service along this segment of the High Line.

8. For the moment, it is not certain whether the High Line adjacent to the ERY will be rehabilitated, demolished and replaced with a platform, or simply demolished—it may depend in part on whether or not a portion of the High Line in or adjacent to the WRY is incorporated into the NYSCC. However, if the High Line is demolished, there are no foreseeable impediments to reconstruction. Certainly, the easements for it will remain in place.

9. It is currently planned that the WRY will be developed with the proposed NYSCC. The facility will be used by the New York Jets, among other uses (including the 2012 summer Olympics if the City is awarded the games). The planned acquisition and conveyance arrangements for the WRY development are complex; however, for purposes of this affidavit, it need only be said that it is expected that within the chain of various conveyances the New York State Urban Development Corporation, d/b/a Empire State Development Corporation, a public benefit corporation created by statute (“ESDC”), will acquire, by lease, an air space parcel in which the WRY project will be developed. In accordance with its statutory procedures, ESDC has drafted a General Project Plan (“GPP”) for this purpose. The General Project Plan to be presented to ESDC’s board of trustees for approval (subject to changes made in response to public comments to be made at future public hearings) states as follows:

“It is expected that ESDC or a subsidiary of ESDC, MTA and other parties will enter into agreements with the Consolidated Railroad Corporation and other parties in furtherance of the High Line project to, among other things, (i) allow for the removal of the High Line structure within the Project Site; (ii) provide for a relocation of the existing easement, which now runs between 30th Street and 33rd Street, within the Project Site, to permit the development of the NYSCC and (iii)

provide for the future restoration of freight service along the relocated easement if mandated by the federal Surface Transportation Board.”

A copy of that General Project Plan is attached to this Affidavit as Exhibit 2.

10. Attached is a diagram indicating the existing easement and the area in which it is planned that the easement will be relocated. (Exhibit 3)

11. In addition, the Convention Center Development Corporation (a subsidiary of ESDC)(“CCDC”), plans to expand the Jacob Javits Convention Center facilities (which lie north of 34th Street)(the “Javits Center”) into the rail yards lying between Eleventh and Twelfth Avenues and between 33rd and 34th Streets with parking facilities in such area.

12. With respect to the WRY, in my discussions with representatives of the New York Jets and the Convention Center Development Corporation as well as staff members of various City agencies working on the Hudson Yards project, in connection with the development of the Hudson Yards generally and the High Line particularly, I and other representatives have made clear, and such parties understand, the necessity of maintaining the viability of a connection between the High Line and the interstate rail network. The New York Jets, having primary responsibility for the design of the NYSCC, have been fully responsive to this requirement. It is my understanding, based on conversations with CCDC staff, that CCDC also accepts this premise and is willing to work with the City to assure the viability of the interstate network link. Discussions as to planning and design of the Javits Center expansion in a manner that satisfies this requirement are just getting started.

13. The portion of the High Line that is located in the WRY, as it currently exists is in part, within an area on which the NYSCC will be constructed. It is currently planned to relocate the

easement for the High Line so that the High Line may be demolished and the facility constructed but an alternate route made available to reconstruct the High Line should rail service be required to be restored.

14. As planned, the future easement for the High Line will entirely circumnavigate the NYSCC. It is planned that within the portion of the easement box south of the proposed NYSCC, a platform adjacent to the NYSCC will be constructed. This platform will be wide enough to allow a railway viaduct to be placed thereon and shall be capable of supporting the load of freight train service.

15. In any event, the City is generally willing to assume the cost of reconstructing the rail viaduct within the new easement area, including the modification of any structure that may lie within the easement area. Sections 2(b) and (c) of the current draft of the Trail Use Agreement, a copy of which is attached as Exhibit 4, lay out the obligations of the railroads, ESDC and the City with respect to restoration of any altered features of the current High Line structure in the event of restoration of rail service.

16. It is currently planned that the relocated easement will be placed on the westerly side over Route 9A. To my knowledge, there is no insurmountable or particularly unusual problems with running the High Line viaduct over a public street. In fact, the High Line is currently, in part, situated over public streets; there are numerous (commuter) elevated rail viaducts located throughout the City of New York, as well as a monorail to John F. Kennedy Airport situated through the center of the Van Wyck Expressway in Queens. The General Project Plan proposes a pedestrian bridge over Route 9A at 33rd Street; however, if it is desirable that the pedestrian bridge be built at an elevation through which it runs through the easement box, technology

certainly exists and is in place throughout the United States, including the New York Metropolitan area, to allow for the safe crossing of rail tracks by pedestrians. Furthermore, should a pedestrian crossing arrangement not be acceptable to the railroads or found to be less undesirable for other reasons, it would not be difficult to either construct a pedestrian bridge over the easement or to construct a pedestrian bridge in a manner in which it could subsequently be elevated over the easement should rail service be restored.

17. Plans for the relocated easement are in the discussion stages. The City plans to convene a meeting among the public parties to discuss logistics with respect to relocating the current easement. However, there is an understanding among the parties involved of the need to maintain a viable link between the High Line and the interstate rail network, and it is my belief that the parties will cooperate in satisfying that condition so as to allow the High Line to continue to qualify for a CITU.

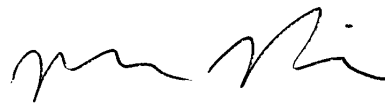
18. There is currently appropriated by the City \$43.25 million for the planning, design and renovation of the High Line for public space purposes. In addition, there are about \$17 million of private cash or in-kind contributions received or pledged for the same purposes. The total cost of the High Line is not certain at this point and will not be known until the City does a more thorough investigation of existing conditions and until design plans for the renovation are complete. The City does not pretend that all the funds necessary for the High Line rehabilitation will be forthcoming within a single fiscal year or that the High Line rehabilitation will be completed all at once. The rehabilitation will likely proceed in stages. However, it is the City's belief that the completed rehabilitation of the High Line will result in an increase in value of the properties adjacent to and in the general vicinity of the High Line, thereby resulting in higher assessed values and increased real estate taxes from such properties. Indeed, the City's support

for the High Line rehabilitation is in part based on this premise, and therefore the City has the economic incentive to appropriate or otherwise obtain funding for the completion of the High Line rehabilitation.

18. In order to spend the currently appropriated \$43.25 million in City funds, which are obtained through the issuance of City general obligation bonds, the City must have a high degree of confidence that the project for which such capital funds are being spent will be realized. The City's Office of Management and Budget, in consultation with bond counsel, have stated that once a CITU is obtained, the capital funds appropriated for the High Line may be spent on planning and design; by the same token, such funds may not be so spent until a CITU has been obtained.

19. In the agreements reached between CPO and the City, the owners of certain properties, at their expense, will undertake certain structural improvements to the High Line or improvements accessory to the High Line which are designed by the City's planning team, provided that the City delivers construction documents to the owners by September 30, 2006 (failure to meet this date will result in the owner's having to make improvements of their own specifications or to "buy-out" of their construction obligations). Since City funds for the design of the High Line cannot be spent until a CITU is issued, delay in issuing the CITU impedes the City's meeting this deadline. Accordingly, it is critical to the optimal success of the High Line that a CITU be issued as soon as possible.

20. Further, Affiant sayeth not.



Marc Ricks

Subscribed and sworn to
before me this 5th day of January, 2005

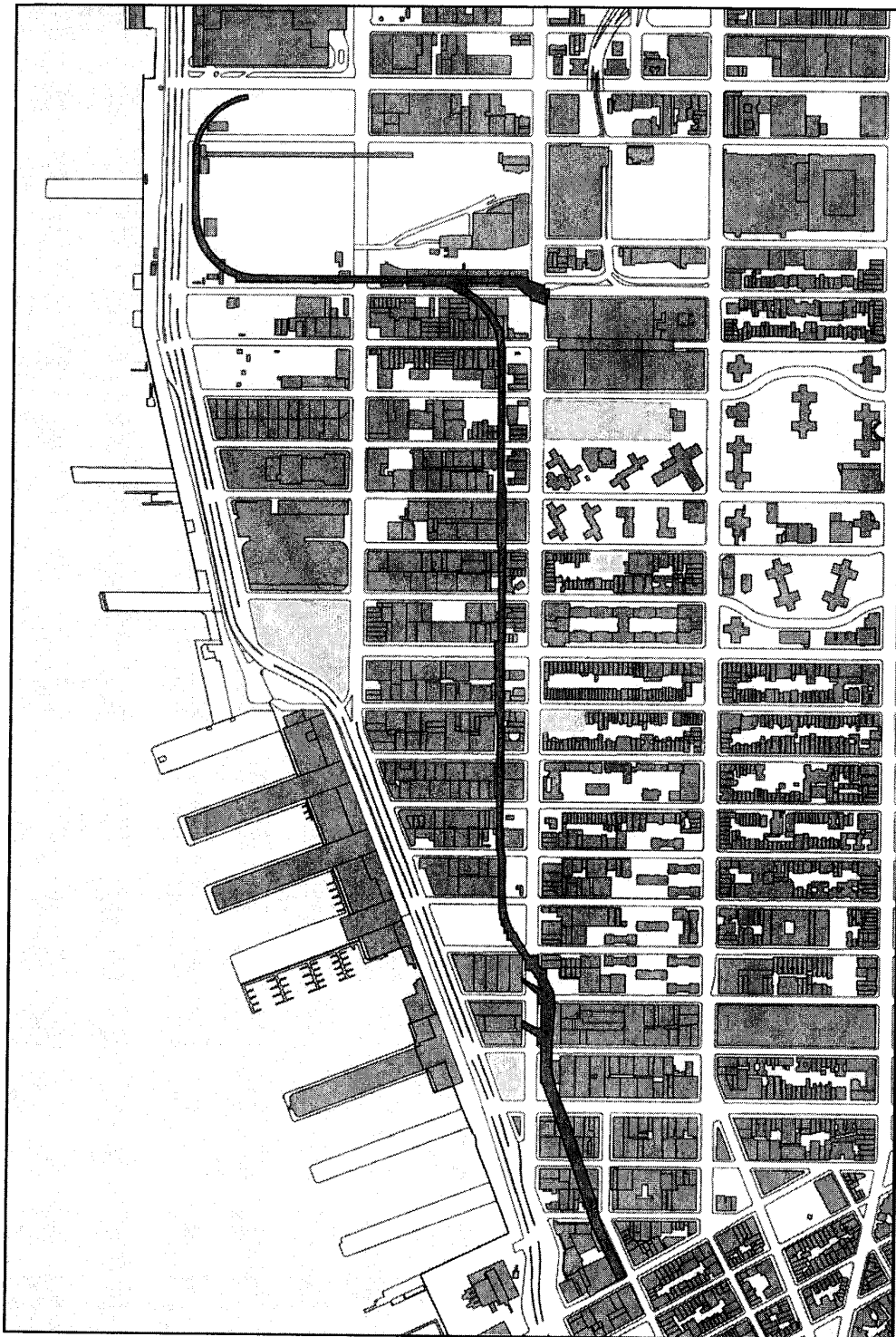
Jane Grogan

Notary Public
My Commission Expires:

ND: 4848-8379-5456, Ver 1

JANE GROGAN
Notary Public, State of New York
No. 01GR6028122
Qualified in New York County
Commission Expires July 19, 2025

1





2

General Project Plan

New York State Urban Development Corporation d/b/a Empire State Development Corporation

New York Sports and Convention Center Land Use Improvement Project & Civic Project

Adopted November 4, 2004

Introduction

The New York Sports and Convention Center Land Use Improvement Project and Civic Project (the "Project") has been established as a project under the New York State Urban Development Corporation Act (the "UDC Act"). The Project is being undertaken by the New York State Urban Development Corporation ("UDC") d/b/a the Empire State Development Corporation ("ESDC"), the City of New York (the "City"), the Metropolitan Transportation Authority ("MTA"), the New York Jets LLC (the "Jets"), owner of the New York Jets football franchise, and the New York Jets Development LLC ("Jets Development"), an affiliate of the Jets. ESDC may pursue the Project directly, through a subsidiary of UDC established pursuant to the UDC Act, or in combination with a UDC subsidiary.

Project Goals

The goal of the Project is to develop the New York Sports and Convention Center ("NYSCC") as a first class multi-use facility that will be suitable for convention center and trade show events, plenary sessions events, professional football events, national events, including Super Bowls, NCAA Basketball Finals, College Bowl Games, and other events that require the type of large venue that New York City now lacks. The NYSCC is also being designed to accommodate Olympic specifications in the event that New York City is successful in its bid to host the 2012 (or subsequent) Olympics.

It is the expectation of the State of New York (the "State") and the City that the Project will generate significant tax revenues for the State and City, create significant employment opportunities for New York residents in the construction and operation of the NYSCC and help spur economic development on the far west side of Manhattan. It is also expected that the Project will help attract conventions and trade shows to New York City for which there presently are inadequate or unsuitable facilities.

The Project is an important component of the No. 7 Subway Extension – Hudson Yards Rezoning and Development Program for the far west midtown area of Manhattan (the “Hudson Yards Program”) that is being proposed by the City. The Hudson Yards Program envisions, among other improvements, the rezoning of the far west side, an expansion of the Jacob Javits Convention Center (the “Javits Center”), the extension of the No. 7 subway line and a network of parks and open space throughout the Hudson Yards, including a publicly accessible open space located between West 33rd and West 34th Streets and 11th and 12th Avenues (the “Open Space”) which could accommodate retail and other active uses. Although those improvements may impact and benefit the Project, the Project is independent of those actions and may proceed with or without the other elements of the Hudson Yards Program.

Project Description

The Project site, located on the far west side of Manhattan, is generally bounded by West 30th Street, West 33rd Street, 11th Avenue and 12th Avenue (a/k/a Route 9A) (the “Railyards”). The Project site also includes certain airspace over the street beds of West 30th Street and West 33rd Street between 11th and 12th Avenues (the “City Parcels”) and a pedestrian bridge that will cross over Route 9(A) (the “9A Parcel”). (The airspace over the Railyards, the City Parcels and 9A Parcel are collectively hereinafter referred to as the “Project Site”.) As a result of the Project, West 33rd Street will be permanently closed to vehicular traffic between 11th and 12th Avenues. A site plan is attached hereto as Exhibit A.

The Railyards are currently owned by the Triborough Bridge and Tunnel Authority (“TBTA”), an affiliate of the MTA, and the portion between West 31st and West 33rd Streets is operated as an active rail yard by the Long Island Rail Road (“LIRR”), also an affiliate of the MTA.

The Project includes the development and construction of a steel and concrete platform (the “Platform”) over the Railyards. The Platform will serve as an enclosure for the LIRR rail operations and potentially other MTA facilities, such as a bus garage, that would be located between West 30th and West 31st Street. It is expected that there will be minimal disruption to the LIRR operations at the Railyards during construction of the Platform and operations will continue unimpeded thereafter. The Platform is expected to be approximately 27 feet above existing grade.

The Platform will serve as the base for the construction of the approximately 2.2 million square foot NYSCC. The NYSCC will be constructed to permit (i) an approximately 75,000 seat configuration for open air stadium type events; (ii) an approximately 180,000 square foot exhibition hall for convention, trade shows, plenary sessions and other events; and (iii) approximately 18,000 square feet of meeting rooms to serve conventions, trade shows, plenary sessions and other events. The NYSCC will have a retractable roof and be usable year round.

The NYSCC will largely be a steel and glass structure. The fixed roof of the enclosed building will rise approximately 200 feet above the Platform, with the north and south walls extending an additional 100 feet above the fixed roof. In order to convert from stadium mode to convention configuration, the NYSCC is expected to include a removable palletized artificial playing

surface, a movable lighting grid and a fully retractable lower bowl seating system. The NYSCC is expected to have in excess of 200 luxury suites and 7,000 club seats and will include amenities generally associated with modern professional football stadiums of this size, including food and beverage facilities.

The NYSCC would be located to the south of the proposed Open Space that is part of the Hudson Yards Program. As part of the Project, out of the proceeds of the Jets Bonds, Jets Development will construct and pay for three elements of public infrastructure which are outside of the footprint of the NYSCC: (i) a two level structure above portions of 33rd Street between 11th and 12th Avenues, to provide access to the sports event and exhibition event levels of the NYSCC and pedestrian access from 11th Avenue to the river front; (ii) a pedestrian bridge over Route 9A, at 33rd Street, to provide access to the Hudson River Park and to the ferry terminal at 39th Street; and (iii) a rebuilt portion of the High Line on the southern side of the NYSCC, allowing pedestrian access to the facility and an attractive promenade along 30th Street (collectively, the "Public Infrastructure"). Jets Development will also agree to fund 50% of the cost of the proposed 39th Street pedestrian bridge over Route 9A – although the development and construction of the 39th Street pedestrian bridge is not part of the Project or this General Project Plan.

Major street entrances for the NYSCC would be located on the north and south sides above street level (accessed by ramps, steps, and/or escalators). The north entry would be located along the West 33rd Street frontage (26 feet above street level at 11th Avenue and West 33rd Street). This entrance would serve patrons arriving from the ferry terminal at West 39th Street and 12th Avenue, the proposed No. 7 subway extension station, and patrons who arrive through Penn Station. The south entry would be located along the length of the West 30th Street frontage, with access from the rebuilt High Line on West 30th Street via an elevated pedestrian connection. Two east entries would be located along the 11th Avenue façade for club and suite guests.

The NYSCC structure would be approximately 800 feet long in the east-west direction and 710 feet in the north-south direction. The present design calls for wind turbines to be located on the roof along the northern and southern ends of the facility at a height of 311 feet above the elevation of 11th Avenue, which is itself approximately 32 feet above sea level. The NYSCC orientation will allow the block between West 33rd and 34th Streets (above the Javits Center truck marshalling yard) to be used for the proposed Open Space pursuant to the Hudson Yards Program and the Javits Center expansion project. Upon completion of the proposed Javits Center expansion and No. 7 subway extension, it is expected that an underground connection would be provided between the Javits Center, the No. 7 line and the NYSCC.

Open spaces, pedestrian circulation and edges with active retail and other uses would be provided in and around the NYSCC as part of the Project. Along the northern edge, Jets Development will construct a publicly accessible, two-level structure in the bed of 33rd Street between 11th and 12th Avenues. The first level is at the same elevation as 11th Avenue and will provide entry to the public exhibition level of the NYSCC. The first level will also contain meeting rooms, a pre-function corridor along the outside wall, and a connection to the open space to the north above the Javits marshalling yards. A portion of this level will continue across Route 9A to serve as a pedestrian bridge connection to Hudson River Park. The second level

with an approximate width of 60 feet would be an open plaza approximately 26 feet above the street and will serve as the entry to the main concourse of the NYSCC. Grand stairs with an approximate width of 40 feet at the east and west edges of the plaza provide access to and from the second level.

Continuous pedestrian access to the waterfront will be provided along the northern facade of the NYSCC. Active convention related and other retail uses would be located within the first level of the two-level structure in the bed of 33rd Street. In the event of development of the Open Space to the north, retail and other active uses, as well as pedestrian access, could be expanded north of the 33rd Street right of way as part of the Open Space, providing additional active, retail or other uses. Such Open Space could be located at the same grade as the first level and adjoin the first level of the two level structure.

The east side of the NYSCC facing 11th Avenue will include extra-height retail storefronts, box offices and building entries along approximately 65% of the façade including a visually significant retail space at the corner of 33rd Street and 11th Avenue. This eastern edge will have pedestrian circulation space (from curb to building edge) which is expected to have a minimum width of approximately 20 feet and an average width of approximately 30 feet along the entire length of 11th Avenue.

On the south side facing 30th Street, the NYSCC will incorporate a replaced portion of the High Line as part of an approximately 30-foot wide publicly accessible pathway with stairwells near 11th and 12th Avenues for access from the sidewalk. This portion of the High Line would provide access to the NYSCC and the pedestrian space along the western edge. Beneath the High Line, the design provides for a series of open-air market stalls fronting on the existing sidewalk which is approximately 12 feet in width.

Along the west side of the NYSCC facing 12th Avenue, the main pedestrian circulation space will be along a continuous balcony that connects into the High Line to the south and the 33rd Street pedestrian bridge and proposed open space to the north. This pedestrian circulation is expected to have a minimum of 12 feet width along the entire western edge of the NYSCC and would provide riverfront views over 12th Avenue and access into a retail space within the NYSCC on the public exhibition level of the NYSCC.

Sustainable Development

It is expected that the NYSCC will be the most environmentally sensitive facility of its kind in the country and the first LEEDs (Leadership in Energy and Environmental Design) certified building of its type. Turbines will harness the winds off the Hudson River, enabling the facility to generate some of its own power. A rainwater harvesting system on the retractable roof will enable the reuse of millions of gallons of rainwater for non-potable use. Other features include solar heating tubes, wastewater management system and natural ventilation – all of which are designed to minimize the project's impact on non-renewable energy sources. In addition, consistent with requirements set forth in the Generic Environmental Impact Statement for the Hudson Yards Program, Jets Development will require the utilization of low sulfur diesel in all

construction vehicles, special filters on appropriate construction equipment and the use of newer construction equipment with more controlled emissions.

A schematic design of the NYSCC, open space, and Platform is set forth in Exhibit B to this General Project Plan.

NYSCC Events

Upon completion, the NYSCC will be utilized for a minimum of ten Jets football games a year (eight regular season games and two pre-season games) and will be available, as needed, for home play-off games involving the Jets. If the City is successful in its efforts to host the 2012 (or subsequent) Olympics, the NYSCC will be made available for opening and closing ceremonies and track and field events. The NYSCC can be converted to an Olympic configuration by extending the structure to the West and adding seating. (The cost of this reconfiguration is not included within the Project budget. The expectation is that it would be paid by the Olympic Host Committee.)

The NYSCC will be available for conventions and trade shows (see Section on Convention and Trade Show Use Protocol), concerts and other suitable events for a facility of this size. In addition, the NYSCC will be available as a supplement to the Javits Center for events that can not be accommodated at the Javits Center, even after its proposed expansion. Although market factors will determine the ultimate uses at the NYSCC, Jets Development has projected a usage plan for the NYSCC as follows:

| Annual Event Schedule | Stadium | Expo Events | Plenary Sessions | National Events | Total |
|---------------------------|---------|-------------|------------------|-----------------|-------|
| Number of Events | 17 | 38 | 3 | 2 | 60 |
| Days per Event | 1 | 3 | 1 | 1 | |
| Total Event Days | 17 | 108 * | 3 | 2 | 130 |
| Transition Days per event | 2 | 3 | 3 | 2 | |
| Total Transition Days | 34 | 114 | 9 | 4 | 161 |
| Total Days | | | | | 291 |

* Expo events include trade shows and conventions, consumer shows and special events. Certain Expo events are expected to be less than 3 days.

Lease and Financing Structure

The Project has a development budget of \$1.4 billion (exclusive of the cost of purchasing air rights and net of typical financing costs) and is expected to be funded from three funding sources; (i) the Jets, and private funding sources arranged by the Jets, including loans from the National Football League; (ii) the State, directly, or indirectly through ESDC; and (iii) the City, as described below.

The Jets will arrange or be responsible for paying a minimum of \$800 million (net of financing costs) for construction of the Project. It is expected that \$150 million will be made available pursuant to the National Football League program to assist in the development of new facilities and \$250 million will be made available in equity or other private financing. It is expected that \$400 million of the \$800 million development costs will be made available through the Jets Bonds (defined below)¹. None of the State, City, ESDC, or MTA will provide any security or have any obligation under the financing arrangements for the \$800 million, including the Jets Bonds. In addition to the foregoing and in cooperation with Jets Development, ESDC may elect to sell personal seat licenses for certain NYSCC events to raise additional funds for the development of the Project, as is typically structured in other stadium financings.

Any Project cost overruns will be borne by Jets Development. In the event that Project costs are less than \$1.4 billion, the cost savings will be shared, pro rata, by the State, City and Jets Development.

The proposed multi-tiered lease structure is designed to assist in accommodating financing requirements and help achieve public sector goals for the development of the Platform and NYSCC. It is envisioned that the State and the City, cooperatively, will cause to be established one or more not-for profit Local Development Corporation(s) (the "LDC") to assist in financing and structuring the Project. The LDC will be jointly controlled by the City and the State, each of which shall have equal representation on the LDC's board.

The Railyards are currently owned by the TBTA. It is expected that the TBTA will convey its fee interest in the Railyards to the MTA and that the MTA will retain title thereto. In addition, one or more easements are expected to be recorded that will impact the lease structure described below.

ESDC is expected to acquire a fee interest in the City Parcels pursuant to its statutory condemnation powers. It is also expected that appropriate approvals will be granted to allow for the construction of the pedestrian bridge over the 9A Parcel.

Generally, it is expected that the Project Site will be leased, subleased and financed in accordance with the following structure:

- (i) MTA will lease the airspace above the Railyards to the LDC. The LDC, through one or more issuances of tax exempt bonds (collectively the "Public Sector Bonds"), will raise \$600 million allocable to construction costs related to the Platform and the roof for the NYSCC. The issuance of the Public Sector Bonds shall be conditioned upon the City and the State, respectively, each agreeing to be obligated for the payment of all debt service and issuance costs with respect to 50% of the Public Sector Bonds. The State's obligation on its portion of the Public Sector Bonds (the "Allocated Bonds") may be secured by a rental stream from ESDC on its sublease from the LDC

¹ In the event the estimated Project cost exceeds \$1.4 billion, including the cost of Public Infrastructure, the Jet Bonds may be increased accordingly, provided that the Jet Bonds will not exceed \$450 million, net of financing costs.

(see (ii) below), such payment obligation being subject to and conditioned upon appropriations from the State Legislature to ESDC for such purpose². The City will finance its portion of the Public Sector Bonds by assignment of a revenue stream to the LDC sufficient to pay debt service and issuance costs on its share of the Public Sector Bonds.

- (ii) The LDC will lease the airspace to ESDC, pursuant to which the LDC will agree to fund and ESDC will agree to utilize the proceeds of the Public Sector Bonds for construction of the NYSCC and ESDC will agree to pay rent to the LDC (equal to debt service on the Allocated Bonds, or if one of the events described in footnote 2 occur, \$1).
- (iii) ESDC will lease the airspace to the City to provide the City with an interest in the real property.
- (iv) The City will lease the airspace back to ESDC.
- (v) ESDC will lease the Platform to the MTA for \$1.00.
- (vi) ESDC will lease the airspace above the Platform and a portion of its interest in the City Parcels (i.e. that portion of the City Parcels necessary for the development of the Public Infrastructure) to the LDC. The LDC will issue additional tax-exempt bonds (the "Jets Bonds") to pay a portion of the cost of the NYSCC and the cost of the Public Infrastructure.
- (vii) The LDC will lease the airspace above the Platform and a portion of its interest in the City Parcels to Jets Development. This lease and ancillary agreements will require Jets Development to construct the Platform, the NYSCC and the associated Public Infrastructure, and to provide any additional funds needed to construct these improvements. The Project Site is currently exempt from real estate taxes and, as a result of public ownership, the Platform and NYSCC will be tax exempt. The lease will require Jets Development to make payments in lieu of taxes ("PILOT") for the estimated useful life of the NYSCC, which will not exceed real estate taxes that would otherwise be payable but for public ownership. These payments will be assigned to a PILOT trustee who will remit such payments to the LDC, to apply toward debt service on the Jets Bonds and toward operating and maintenance costs, and capital renewal and replacement costs, of the NYSCC.

The leases described above will be coterminous. Each lease is expected to have a term of 49 years and will be subject to options exercisable by Jets Development to extend the lease terms to 99 years.

² In the event the State Legislature does not authorize the appropriation of funds for ESDC to pay rent to the LDC (i.e., debt service payments on the Allocated Bonds) prior to the issuance of the Public Sector Bonds, the City will assume the State's obligation on the Allocated Bonds, provided that the City and the State identify by agreement a cash equivalent comparable opportunity for the City to be made whole for its assumption of the State's obligation on the Allocated Bonds. Such cash equivalent comparable opportunity may take the form of any or a combination of the following: (i) compensation or other direct State payments or property transfers to the City, (ii) offsets against City commitments on other joint State/City initiatives, which may include, but not be limited to, the State's agreement to replace in the MTA capital plan an amount equivalent to the Allocated Bonds to replace an equivalent amount from the \$2 billion that the City will make available to the MTA's capital plan for the construction of the No. 7 subway line, and (iii) relief from obligations which the City may otherwise be obligated to the State.

Jets Development, as the operating tenant, will enter into an agreement with the Jets whereby the Jets will agree to play all of their home games at the NYSCC for not less than 30 years. The Jets will also enter into a non-relocation agreement with ESDC, the City and the MTA to directly guaranty that it will remain and play all of its home games at the NYSCC for not less than 30 years. Jets Development will also enter into other leases, license and other agreements, as appropriate, for the use and occupancy of the NYSCC.

It is expected that Jets Development will also enter into an agreement with the Convention Center Operation Corporation to allow for the NYSCC to be utilized for conventions and trade shows (see Section on Convention and Trade Show Use Protocol).

City and State funds will be made available as indicated above and advanced for Project expenditures during construction on a pro rata basis with private funds.

As a result of public ownership of the Platform and the NYSCC, the Project will receive the benefit of a sales tax exemption for the construction and fit-out of the Project and a mortgage recording tax exemption to the extent any of the Project financing is secured by a leasehold mortgage.

The precise breakdown of Jets arranged financing may change as a result of Project needs and financial conditions at closing.

Platform Maintenance and Payments to MTA

The Platform structure will be maintained by Jets Development. Any systems and appurtenances serving LIRR and MTA operations under the Platform will be maintained by or on behalf of the MTA, or an affiliate of the MTA.

In addition to paying the cost of constructing the NYSCC and the Public Infrastructure, as described above, Jets Development will pay to the MTA the agreed upon fair market value of the airspace above the Railyards as determined by Jets Development and MTA which payment, in part, will reflect the increased cost incurred by the MTA of operating in an enclosed facility and operating and maintaining the systems and appurtenances that serve the enclosed Railyards for the term of the Jets Development lease.

Economic Impact

ESDC has performed an independent economic impact analysis of the Project. (Separate analysis – using different forecasting models - has been performed by consultants to Jets Development and the City.) ESDC has projected that the Project will have the following impacts during construction and for the first 30 years of operations:

- (i) Construction of the Project will generate 7,287 new direct jobs and 12,752 total jobs (direct, indirect and induced);

- (ii) Direct personal income related to construction activities will be \$442.8 million and total personal income will be \$717.4 million (direct, indirect and induced);
- (iii) Construction employment will generate \$30.6 million in City sales and income tax revenues and \$46.7 million in State sales and income tax revenues;
- (iv) Operations at the NYSCC and additional visitor spending in the region will support 2,575 new jobs in New York City (direct, indirect and induced) and 3,110 new jobs statewide (assumes a Super Bowl once every 5 years); and
- (v) On a present value basis, the NYSCC will generate \$499.8 million of City tax revenues and \$595.2 million of State tax revenues.

Project Purpose – Basis for Land Use Improvement Project and Civic Project Findings

The primary purposes of ESDC's participation in the Project are (i) to redevelop a blighted area and to have that redevelopment serve as a linchpin and catalyst for the plan to redevelop the far west side of Manhattan, generally as described in the Environmental Impact Statement prepared by the MTA and City for the Hudson Yards Program; (ii) to develop a facility that as an independent venue and in combination with the Javits Center, will attract additional conventions and trade shows to New York City that would otherwise go to other cities because New York City lacks an appropriate facility for small to mid-sized shows, or in the case of larger shows, because the Javits Center, even with its proposed expansion, does not provide sufficient exhibition space or plenary space facilities; (iii) to generate additional economic activity and City and State tax revenues (including sales tax revenues from operations and income tax revenues from performers at the NYSCC) by holding professional football and other events within New York City that otherwise would occur elsewhere; (iv) to attract national events to the City, such as a Super Bowl, NCAA Basketball Final or a major bowl event, that would otherwise occur elsewhere; and (v) to enhance the City's bid to host the 2012 (or subsequent) Olympics.

Specifically, the Corporation, pursuant to Section 10 of the UDC Act, has made the findings set forth below. These findings are supported and complemented by the findings, determinations and statements of fact described in the Draft Generic Environmental Impact Statement for the Hudson Yards Program.

Land Use Improvement Project Findings

1. That the area in which the project is to be located is a substandard or unsanitary area, or is in danger of becoming a substandard or unsanitary area and tends to impair or arrest the sound growth and development of the municipality.

The Project Site entails approximately 13 acres of potential prime real estate within the borough of Manhattan. Its sole use is that of a rail yard for the storage and maintenance of rail cars and accordingly generates limited economic benefits to the City and State. In addition, the Project Site is unattractive and inaccessible to the public. Due to the limited uses of the Project Site, its sheer size, and lack of public access, it serves as an impediment to future development within the Hudson Yards.

The Hudson Yards Program Area is substantially included within Census Tracts 103,111,115,117, 99 and 101. Based on data from the 2000 Census, the unemployment rate for the referenced census tracts is 14.41% - as compared to a Citywide average of 9.69%. The poverty rate (the percentage of individuals that are living below the federal poverty guidelines) for the referenced census tracts is 23.77% as compared to a Citywide rate of 21.2%.

2. That the project consists of a plan or undertaking for the clearance, replanning, reconstruction and rehabilitation of such area and for recreational and other facilities incidental or appurtenant thereto.

The General Project Plan calls for the redevelopment of the Project Site without diminishing the current uses. The enhanced uses generated by the Project will attract people to the Project Site and will, accordingly, help support local businesses. The Project will also generate substantial tax revenues for the City and the State and will generate a substantial payment to the MTA for us of the airspace over the Railyards. It is expected that the Project will remove a blighting influence and serve as a catalyst for future development consistent with the Hudson Yards Program.

3. That the plan or undertaking affords maximum opportunity for participation by private enterprise, consistent with the sound needs of the municipality as a whole.

It is expected that Jets Development will arrange for or otherwise make payments sufficient to repay a minimum of \$800 million of financing for the construction of Project. The Project will be operated by Jets Development and will primarily be utilized for private shows, conventions, sports events and other events.

Civic Project Findings

1. That there exists in the area in which the project is to be located, a need for the educational, cultural, recreational, community, municipal, public service or other civic facility to be included in the project;

New York City is lacking a suitable venue to host major sporting events, such a professional football games, NCAA Basketball Finals and College Bowl Games, as well as conventions that can complement events at the Javits Center and events that cannot be accommodated at the Javits Center, and to attract extraordinary events like the Super Bowl or Olympics. The NYSCC will also be able to support a host of cultural and community events such as concerts, political conventions, graduation ceremonies, etc. In addition to the economic benefits that these events provide to the City and State, they help promote civic pride and provide a venue for large groups of individuals in the New York City region to enjoy a sports, educational or cultural experience. The NYSCC will make the City competitive with other municipalities that have undertaken development of similar public facilities.

2. That the project shall consist of a building or buildings or other facilities which are suitable for educational, cultural, recreational, community, municipal, public service or other civic purposes;

The NYSCC will be designed to accommodate the types of events described in this General Project Plan and will be suitable for the above purposes.

3. That such project will be leased to or owned by the state or an agency or instrumentality thereof, a municipality or an agency or instrumentality thereof, a public corporation, or any other entity which is carrying out a community, municipal, public service or other civic purpose, and that adequate provision has been, or will be, made for the payment of the cost of acquisition, construction, operation, maintenance and upkeep of the project.

As described herein, the Project Site will be owned by the MTA and the NYSCC will be leased to and from ESDC for the purposes previously described. As described herein, adequate funds will be made available for construction of the Project and Jets Development will be responsible for the operation, maintenance and upkeep of the Project.

4. That the plans and specifications assure or will assure adequate light, air sanitation and fire protection.

The ESDC Department of Design and Construction will review and approve all plans and specifications and will assure that the above criteria are satisfied. The NYSCC will be designed and built in accordance with the New York City Building Code with such variance as may be approved by the New York City Department of Buildings. The Platform will be designed and built in accordance with the Building Code of New York State, with LIRR employees, or consultants certified by New York State, acting as code compliance officers.

Findings for all ESDC Projects

That there is a feasible method for the relocation of families and individuals displaced from the project area into decent, safe and sanitary dwellings, which are or will be provided in the project area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities, at rents or prices within the financial means of such families or individuals, and reasonably accessible to their places of employment.

No families or individuals will be displaced as a result of the Project.

Anticipated Construction Schedule

Subject to all financing and all public approval being in place, it is expected that construction of the Project will commence in the Spring of 2005. The construction of the Platform and NYSCC is expected to take approximately 48 months. Accordingly, completion of construction is projected for Spring 2009. It is further expected that the Jets first home game at the NYSCC will be played in August or September of 2009.

Affirmative Action

ESDC will administer and enforce an affirmative action program for the construction of the Project. Jets Development has agreed to make a good faith effort to utilize minority and women business enterprises ("M/WBE's") in the construction of the project as well as ensuring that minorities and women are adequately represented in the construction workforce for the Project. To that goal, the Jets Development has organized an advisory committee including M/WBE advocacy groups to ensure a successful affirmative action program.

Jets Development and ESDC have agreed to a goal of 25% minority and women representation in the workforce for the Project. Based on input from the aforementioned advisory committee, ESDC and Jets Development will agree upon a goal for M/WBE participation prior to affirmation of this General Project Plan.

Override of Local Requirements

In furtherance of the Project, ESDC expects to exercise its statutory authority to override local zoning requirements that apply to the Project Site. The Project Site is currently zoned M 2-3. Pursuant to this override, the Project will be developed and constructed in accordance with the Project description set forth above. ESDC also expects to override City requirements regarding the City Map for 33rd Street between 11th and 12th Avenues and a portion of the airspace that is above the street bed of 30th Street between 11th and 12th Avenues.

Convention and Trade Show Use Protocol

The Convention Center Operating Corporation ("CCOC"), a statutorily created public benefit corporation of the State of New York, is responsible for operating the Javits Center. Jets Development and CCOC have discussed a protocol for the use and operation of the NYSCC for trade shows and conventions that will attempt to maximize the availability of the NYSCC for conventions that use the entire Javits Center and require more space than is available at the Javits Center and to provide that the NYSCC can be utilized for smaller trade shows and conventions that are not able to be accommodated at the Javits Center.

It is expected that a master booking schedule will be maintained to permit either Jets Development or CCOC to reserve dates at the NYSCC. Jets Development will have the exclusive right to book the NYSCC for all sports and entertainment events and to reserve all dates that may be required for the playing of New York Jet football games. Subject to the priority scheduling of football games, it is expected that CCOC will have priority for booking the NYSCC for certain convention and trade show events, provided that such events are scheduled for not less than a stipulated time period in the future, to be agreed to by CCOC and Jets Development. For all other bookings, Jets Development and CCOC will coordinate their activities in furtherance of the goal to maximize use of the NYSCC.

High Line

Consistent with the Hudson Yards Program to redevelop the far west side of Manhattan, the City expects to convert portions of an elevated railway viaduct that extends from Gansevoort Street to approximately 34th Street (the "High Line") to public space. Portions of the existing High Line, including that portion within the Project Site, which is approximately 30 feet wide, and extends along an irregular path from 11th Avenue at West 30th Street to West 33rd Street between 11th and 12th Avenues, will be removed. In place of the portion on West 30th Street between 11th and 12th Avenues, Jets Development will build a pedestrian walkway. As the High Line is an eligible resource for listing on the State and National Registers of Historic Structures, its removal would constitute an adverse effect and mitigation will be required. A Letter of Resolution among ESDC, Jets Development and the State Office of Parks Recreation and Historic Preservation has been prepared to stipulate the mitigation measures agreed upon.

The High Line structure within the Project Site is located within an easement granted, or to be granted, to the Consolidated Railroad Corporation. It is expected that ESDC or a subsidiary of ESDC, MTA and other parties will enter into agreements with the Consolidated Railroad Corporation and other parties in furtherance of the High Line project to, among other things, (i) allow for the removal of the High Line structure within the Project Site; (ii) provide for a relocation of the existing easement, which now runs between 30th Street and 33rd Street, within the Project Site, to permit the development of the NYSCC and (iii) provide for the future restoration of freight service along the relocated easement if mandated by the federal Surface Transportation Board. Furthermore, in order to accommodate the foregoing goals, it is expected that ESDC will join the City in applying to the Surface Transportation Board for issuance of a Certificate of Interim Trail Use. The City will agree to perform any obligations that ESDC, or any subsidiary of ESDC, is liable for under the aforesaid agreements and will fully indemnify ESDC.

A depiction of the existing High Line easement within the Project Site and the proposed relocated site of the easement is set forth in Exhibit C hereto.

Site Investigation and Hazardous Materials

The Railyards have been utilized for decades for railroad and related industrial purposes. Hazardous substances may be present on the surface or in the subsurface. Under the terms of a Temporary Entry License Permit between MTA and Jets Development, Jets Development and their consultants have been provided access to the Railyards to gather information and data that will be utilized (i) by the City and MTA in the preparation of the Final Generic Environmental Impact State for the Hudson Yards Program and (ii) Jets Development to perform certain geotechnical analysis that will be required for the construction of the Project.

Collectively, under the terms of the License and the transaction documents, Jets Development will be obligated to perform any mitigation or remedial program that may be required under applicable laws and regulations or as otherwise agreed to among ESDC, the MTA and Jets Development. Pursuant to terms to be agreed to among ESDC, Jets Development and the City, it

is expected that a remediation program will be submitted to the State Department of Environmental Conservation for approval under the Brownfields Program.

Eminent Domain

In furtherance of the Project, it is expected that ESDC, with the concurrence of the City, will exercise its statutory authority to condemn property, and acquire, by eminent domain, two City-owned parcels. The first parcel constitutes a portion of the airspace that is above the street bed of West 30th Street between 11th and 12th Avenues. The airspace to be acquired is approximately 13 feet wide by 800 feet long and will be utilized for construction and use of a promenade that will allow access to the NYSCC. The second parcel constitutes the street bed of West 33rd Street between 11th and 12th Avenues. A portion of the airspace above West 33rd Street will be utilized for a two-level structure that will provide access to the NYSCC and pedestrian access to the waterfront.

A detailed description of the two parcels to be acquired is set forth in Exhibit D attached hereto.

Public Approval and Environmental Review Process

A Draft Generic Environmental Impact Statement ("DGEIS") for the Hudson Yards Program, inclusive of the proposed development of the NYSCC, was certified by the MTA and Department of City Planning (as co-lead agencies) on June 21, 2004. A public hearing on the DGEIS was held on September 23, 2004. It is expected that the Final EIS will be issued in November 2004. Separate and apart from the DGEIS hearing, ESDC, in conformance with the requirements of the UDC Act and the Eminent Domain Procedure Law, will hold a duly noticed public hearing on this General Project Plan upon not less than 30 days notice and will accept comments on the General Project Plan for a period of not less than 30 days thereafter. Upon the completion of the notice and comment period the Corporation may affirm this General Project Plan in its existing form or in modified form.

Attachments

Exhibit A – Site Plan
Exhibit B – Schematic Design
Exhibit C – High Line Easement
Exhibit D – Condemnation Parcels

Exhibit A – Site Plan

Exhibit B – Schematic Design

Exhibit C – High Line Easement

Exhibit D – Condemnation Parcels



3



EXISTING
WSSY BELOW

| PROPOSED HIGH LINE EASEMENT WITHIN SUBJECT PROPERTY | | REQUIRED | | PROPOSED | |
|--|--------|----------|-----|----------|----|
| EXTENT OF EXISTING HIGH LINE WITHIN SUBJECT PROPERTY | | | | | |
| TURNING RADIUS (R) | 210' ± | 210' ± | MIN | 210' ± | 4" |
| OVERALL EASEMENT WIDTH | 18' | 18' | | 18' | |
| OVERALL EASEMENT HEIGHT | 18' | 18' | | 18' | |

END OF EXISTING HIGHLINE
CONSTRUCTION
EXISTING HIGHLINE EASEMENT
TO REMAIN BEYOND THIS POINT

30th Street

| Project No. | Date | Revision Date | Scale |
|-------------|----------|---------------|-------|
| 1500 01 | 09-22-04 | | NTS |

KPF
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255A

1106
OVERALL PLAN
HIGH LINE EASEMENT PROPERTY





4

TRAIL USE AGREEMENT

THIS TRAIL USE AGREEMENT (this "Agreement"), made as of the ____ day of _____, 2005, by and among **CSX TRANSPORTATION, INC.**, a Florida corporation whose mailing address is 500 Water Street (J-910), Jacksonville, Florida 32202 ("CSXT"), and **THE CITY OF NEW YORK**, a municipal corporation having its principal place of business at City Hall, New York, New York 10007 (the "City"), and the **NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a the EMPIRE STATE DEVELOPMENT CORPORATION**, a public benefit corporation having its principal place of business at 633 Third Avenue, New York, New York 10037 (the "ESDC").

WITNESSETH:

WHEREAS, the City, by Quit-Claim Deed from CSXT of even date herewith (a copy of which is attached as Exhibit B-1 annexed hereto and hereby made a part hereof), is the title-holder to an elevated railway viaduct with highway-railroad grade separation structures and street-level railway improvements known collectively as the "Highline" or the "West 30th Street Secondary Track" in New York City, New York, extending from 75-95 Gansevoort Street and running northerly and westerly to where it crosses 11th Avenue just north of West 30th Street, identified as Line Code 4225 in the records of the United States Railway Association (the "Viaduct"), including those certain easements, within which and upon which said viaduct is constructed, held by CSXT's predecessors-in-title (collectively, the "Easements", more specifically identified on Exhibit A-1 annexed hereto and hereby made a part hereof, and together with the Viaduct and the Property-Specific Easements [as hereinafter defined], the "Highline"), held in accordance with (i) agreements relating to the Easements (collectively, the "1929 Agreements", more specifically identified on Exhibit A-2 annexed hereto and hereby made a part hereof) and (ii) those further easement agreements relating solely to individual properties encumbered by the Easements (the "Property-Specific Easements", more specifically identified on Exhibit A-3 annexed hereto and hereby made a part hereof), said Highline having been conveyed to Consolidated Rail Corporation ("CRC") by deed recorded December 15, 1978 from Robert W. Blanchette, Richard C. Bond and John H. McArthur, as Trustees of the Property of Penn Central Transportation Company, Debtor, as grantor, and CRC, as grantee, recorded in the Office of the City Register, New York County (the "Official Records") in Reel 463, Page 1563-A (the Highline being identified in Reel 463, Page 1567), and thereafter conveyed (to the extent not previously abandoned and subsequently conveyed to Rockrose Construction (Kelly) Corp. by Assignment and Assumption Regarding Easements dated as of November 25, 1990, and recorded in the Official Records in Reel 1747, Page 1584) by CRC to New York Central Lines LLC ("NYCLLC") by deed dated as of June 1, 1999, and recorded in the Official Records on March 1, 2000, in Reel 3067, Page 1110, as corrected by corrective quitclaim deed dated as of August 27, 2004, and intended to be recorded in the Official Records; and

WHEREAS, NYCLLC was merged with and into NYC Newco, Inc., under the name NYC Newco, Inc., and NYC Newco, Inc. was merged with and into CSXT, each merger effective August 27, 2004; and

WHEREAS, ESDC, by Quit-Claim Deed from CSXT of even date herewith (a copy of which is attached as Exhibit B-2 annexed hereto and hereby made a part hereof) is the title-holder to the Viaduct, including the Easements, extending from 11th Avenue just north of West 30th Street through 547-55 West 34th Street and the West 34th Street roadbed; and

WHEREAS, the Highline encumbers the properties beneath it more fully described in the metes-and-bounds descriptions set forth in Exhibit A-4 annexed hereto and hereby made a part hereof; and

WHEREAS, the City and ESDC each wish to use and operate the Highline (for the City's portion, as general municipal property) for railbanking and as public space and are each willing to assume financial responsibility therefor pursuant to and in accordance with and 49 C.F.R. 1152.29 and Section 8(d) of the National Trails System Act (also known as the "Rails-to-Trails Act"), 16 U.S.C. 1247(d) (collectively, and as any of the foregoing may hereafter be amended or interpreted by binding judicial or administrative authority, the "Railbanking Legislation"), and in accordance with the Railbanking Legislation, the City and ESDC have been issued a Certificate of Interim Trail Use ("CITU") a copy of which is annexed as Exhibit C hereto; and

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein and in other agreements among the parties hereto, and for the sum of Ten and No/100 Dollars (\$10.00) in hand paid and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, CSXT and the City and ESDC agree as follows:

1. RAILBANKING OBLIGATIONS

(a) The City and ESDC both agree that, during all periods during which the CITU shall be effective, the City and ESDC shall jointly and severally assume the following obligations in respect of the Highline in accordance with the Statement of Willingness to Assume Financial Responsibility submitted in application for the CITU (the "SWAFR", attached as Exhibit D annexed hereto and hereby made a part hereof), and otherwise in accordance with the Railbanking Legislation: (w) all responsibility for the management of the Highline; (x) all responsibility for all legal liabilities arising out of or relating to the transfer, use, possession, management, operation or control of the Highline, including but not limited to the performance of the obligations of the grantee under the Easements; (y) all responsibility for the payment of any and all taxes that may be levied or assessed against the Highline in connection with its existence, use or transfer, physical relocation and/or augmentation, or any activities conducted thereupon; and (z) all other obligations arising under the Easements, the CITU, the SWAFR, and/or the Railbanking Legislation as it applies to the Highline, whether or not such obligations are explicitly described, detailed, or otherwise set forth herein (clauses (w) through (z), collectively, the "Railbanking Obligations"). Nothing in this Agreement is intended to prevent the City and the ESDC, by separate agreement between them, allocating to one or the other by such agreement the individual respective obligations of each for discharge of

the foregoing Railbanking Obligations or any of them. Nothing in this Agreement is intended to effect an assignment of CRC's pre-existing common carrier obligation, with respect to the Highline, to the City or to ESDC, or to effect an assumption of any such obligation by the City and/or ESDC from CRC. In the event the City and/or ESDC shall come under an obligation, during the term of this Agreement, to provide freight service over the Highline, the City or ESDC may at its respective option (and in accordance with the procedures and requirements of the Surface Transportation Board or any successor Federal agency regulating railroad freight traffic) assign or otherwise transfer any such obligation to an individual or entity which is, in the sole opinion of the City or of ESDC, as the case may be, financially sound and able to fulfill that obligation. CSXT agrees that it shall not seek nor permit any "CSXT Affiliate" (defined in Section 2(g) below) to seek reinstitution of rail service on the Highline for its own account or that of any CSXT Affiliates.

2. RELOCATION AND AUGMENTATION; TERMINATION OF CITU; INDEMNITIES.

(a) Relocation and Augmentation. In the event that any physical relocation or/or augmentation (e.g., stairways or ramps for pedestrian access) of the Highline or any part thereof shall in the opinion of the City and/or ESDC be necessary or desirable during the term of the CITU, CSXT hereby consents in advance to any such relocation and/or augmentation, *provided that* (i) such relocation or augmentation, as the case may be (including, without limitation, all preparatory and post-completion surveys, engineering and architectural plans and specifications and all environmental reports, all negotiation and other legal relations with property owners encumbered by the Highline, and all demolition and construction contracts, subcontracts and insurance policy coverages) shall be done at the sole cost of the City and/or ESDC and in no event shall CSXT be deemed to bear any responsibility whatsoever for any such relocation or any costs thereof or any liability arising therefrom, and (ii) the ability to recreate or reconstruct a fully connected Highline easement corridor in a box easement, not smaller than sixty (60) feet in width and thirty (30) feet in height (except where and in what dimensions otherwise agreed in writing by CSXT), from its southernmost terminus to 34th Street and 11th Avenue, New York City, and the ability to connect the Highline easement corridor, through a usable and operationally feasible connection, with the interstate rail network, shall be maintained.

(b) Post-Railbanking Restoration and Removal. In fulfillment of the foregoing proviso (ii) in Section 2(a) above, the City and the ESDC each covenant and agree that, (a) in the event that either the City or ESDC, after the date of issuance of the CITU, has removed any railroad tracks or other railroad equipment or supporting apparatus within the said Easements and/or Property-Specific Easements (the "Easement Structure/Equipment") or, below the elevation of the lower plane(s) of such easements, the columns, column brackets, footings, foundations, supports and drainage pipes necessary or convenient for the support of the tracks, structures, appliances and facilities with the easement areas (collectively, the "Supporting Structures"), except as to such Easement Structure/Equipment or such Supporting Structures the removal of which has been approved in writing by CSXT's Chief Engineer without requirement of future

restoration hereunder, or (b) in the event that any equipment or improvements ("Post-Railbanking Installations") have been constructed or installed, after the date of issuance of the CITU, within the Easements or the Property-Specific Easements (including but not limited to same as they may have been relocated north of West 30th Street) which Post-Railbanking Installations, in the sole opinion of CSXT, its successors and assigns, would prevent or otherwise impede the restoration of rail service permitted under the Railbanking Legislation, then and in such event either the City, as to its deeded portion of the Highline south of West 30th Street and east of Eleventh Avenue, or ESDC, as to its deeded portion of the Highline north of West 30th Street and west of Eleventh Avenue, each at its own sole cost and expense, shall, within ninety (90) days following notice from CSXT to the title-holder in question that CRC is obligated to reinstitute rail service upon and through the Easements and/or the Property-Specific Easements consistent with CSXT's covenants under this Agreement, or is obligated to pay or reimburse any non-CSXT Affiliates for the return, restoration or replacement of any (1) Easement Structure/Equipment or (2) Supporting Structures, or the removal of any Post-Railbanking Installations, in connection with the reinstitution of rail service upon and through the Easements and/or the Property Specific Easements, (A) in the case of such CSXT reinstitution of rail service, (x) return and restore or replace all Easement Structure/Equipment and Supporting Structures (the restoration of which has not been previously waived in writing as hereinabove set forth) and/or (y) remove all Post-Railbanking Installations, or (B) in the case of CSXT's paying or reimbursing any non-CSXT Affiliates for same, pay CSXT for the cost of the return, restoration or replacement of all such Easement Structure/Equipment and/or Supporting Structures and the removal of any Post-Railbanking Installations. The City and ESDC shall and hereby do jointly and severally indemnify and hold CSXT harmless, as set forth in Section 2(f) hereof, from and against all costs and liabilities associated with or arising from any of the actions, matters or activities, or from the failure to timely perform any such actions, described in Section 2(a) above and in this Section 2(b). The covenants set forth in this paragraph 2(b) are for the exclusive benefit of CSXT and CSXT Affiliates and no other party shall be a third party beneficiary thereof.

(c) Cooperation by CSXT. In the event that the CITU is revoked, terminated, or for any reason whatsoever ceases to be in effect, or if the City seeks formal abandonment of the Highline, CSXT shall cooperate with the City in the filing with the federal Surface Transportation Board or its successor-in-function (the "STB"), or any successor agency thereto, of a formal application for abandonment of the Highline, in order to permit and facilitate the City's and/or ESDC's demolition, removal and other physical and legal disposition of the Highline. Such cooperation shall be upon reasonable advance request by the City and/or ESDC and at the City's and ESDC's sole expense in reimbursement of CSXT's reasonable legal fees and disbursements in effecting such filing for abandonment and the submission of information, filings or applications to the STB or successor or other governing agency or regulatory body having or claiming jurisdiction as may be necessary to enable such abandonment and subsequent demolition, removal, and/or other physical and legal disposition of the Highline. As used in this Section 2(c), "demolition, removal and/or physical and legal disposition" by the City and ESDC shall include, without limitation, structural demolition, hauling, disposal, environmental protection and remediation and the protection, restoration of extant properties or structures appurtenant or servient to the

Highline. As used in this Section 2, "legal disposition" shall include, without limitation, the extinguishment and/or modification of easements, payment of all real estate transfer and real property taxes, discharge of liens and other encumbrances on the Highline and settlement of other title matters, causing to be changed any governmental records (such as municipal or tax maps) as necessary in connection with the removal of the Highline, obtaining all necessary permits, licenses, certificates and other permissions or approvals for the work described in this Section 2(c), including, without limitation, the prosecution of supplementary filings and proceedings before the STB for the formal abandonment and/or transfer of the Highline. The foregoing notwithstanding, the surrender or other termination of the CITU and the issuance of an order of abandonment or other order to similar effect by the STB shall not in any way require the demolition, removal or disposition of the Highline so long as (a) the Highline is being used or is intended to be used for linear public space, public trail use or other public recreational purpose, as general municipal property, and not for any rail service ("Public Space") in accordance with the terms of this Agreement and any other agreement between CSXT and the City and/or ESDC (which may include other parties) relating to the Highline, (b) the City and ESDC are not in default after notice and the expiration of any applicable cure periods under this Agreement or any other agreement between CSXT and the City and/or ESDC (which may include other parties) relating to the Highline, and (c) the City and/or ESDC continue to fulfill their SWAFR covenants of management of, liability for, and real estate tax payment for the Highline. Any requirement or condition herein or in the CITU or other agreement between the City and/or ESDC and CSXT (which may include other parties) relating to the Highline that the Highline be used or be intended to be used for Public Space shall not be construed to require or create any condition that any portion of the Highline over or adjacent to the rail yards north of 30th Street be improved, developed, operated, used or maintained for Public Space purposes. Notwithstanding the foregoing, in no event shall CSXT be deemed to bear any responsibility whatsoever for any demolition, removal or other physical or legal disposition of the Highline or any costs or liabilities arising therefrom or arising from CSXT's cooperation with the City and ESDC in connection therewith, and the City and ESDC shall and hereby do jointly and severally indemnify and hold CSXT harmless, as set forth in Section 2(g) hereof, from and against all costs and liabilities associated with or arising from any of the actions, matters or activities described in this Section 2(c).

(d) Indemnity for Demolition and/or Disposition. In the event that the City and/or ESDC undertakes the demolition, removal or other physical or legal disposition of the Highline as contemplated in Sections 2(a) and 2(b) above, all such actions and undertakings shall be the sole responsibility of the City and ESDC and in no event shall CSXT be deemed to bear any responsibility therefor or any cost thereof or any liability arising therefrom. The City and ESDC shall and hereby do jointly and severally indemnify and hold CSXT harmless, as set forth in Section 2(g) hereof, from and against all costs and liabilities associated with or arising from any of the actions, matters or activities described in this Section 2(d).

(e) Indemnity for Subsequently Arising Obligation of CSXT. In the event that any finally determined action or cause of action, or any finally determined ruling, decision or determination of the STB or any successor thereto or any other judicial or regulatory agency or body having or claiming jurisdiction or any process of alternative

dispute resolution shall, whether directly or by operation of law, obligate CSXT to demolish or otherwise undertake the physical or legal disposition of the Highline, or to bear any cost thereof or any liability arising therefrom, the City and ESDC shall, at the City's and ESDC's sole expense, undertake and perform any such action so required to be performed by CSXT as if such action were required to be performed by the City and/or ESDC by the terms of such action, ruling, decision or determination. In addition to the foregoing, the City and ESDC shall and hereby do jointly and severally indemnify and hold CSXT harmless, as set forth in Section 2(g) hereof, from and against all costs and liabilities associated with or arising from any of the actions, matters or activities described in this Section 2(e).

(f) Disputes and Legal Proceedings. In the event of any legal proceeding before the STB or any successor agency or any other judicial or regulatory agency or body having or claiming jurisdiction, or any other action, proceeding or other dispute arising in connection with the CITU or its effectiveness or continuation or revocation, CSXT shall cooperate with the City and ESDC in the City's and/or ESDC's prosecution or defense thereof or participation therein. Such cooperation shall be upon reasonable advance request by the City and/or ESDC and at the City's and/or ESDC's sole expense and shall include, without limitation, the provision of documents to the City and/or ESDC reasonably necessary to such prosecution, defense, or participation and also the submission of information, filings or applications to the STB or other governing agency or regulatory body, to the extent such actions cannot be accomplished by the City and/or ESDC. The City and ESDC shall and hereby do jointly and severally indemnify and hold CSXT harmless, as set forth in Section 2(g) hereof, from and against all costs and liabilities associated with or arising from any of the actions, matters or activities described in this Section 2(f), and shall reimburse CSXT upon demand for all reasonable legal and other professional fees and expenses incurred in connection with rendering such cooperation.

(g) Indemnification.

(i) For the purposes of this Section 2, "CSXT" shall be deemed to include all affiliates of CSXT, individually, collectively and in any combination, such affiliates including Conrail, Inc., Consolidated Rail Corporation, CSX Corporation, and CSXT, as well as any persons or entities which may hereafter control, be controlled by or be under common control with CSXT or its successors in interest (the "CSXT Affiliates").

(ii) Each of the City and ESDC hereby assumes, releases and shall defend (as set forth in Section 2(g) hereof) reimburse, indemnify, protect and save CSXT and CSXT's (and each of CSXT's Affiliates') officers, directors, attorneys, consultants and agents, to the extent permitted by law, harmless from and against any and all liability, damage (including, but not limited to special, direct or indirect, or for personal injury, death or property damage), action, cause of action, demand, suit, loss, fine, penalty, claim, cost or expense of any kind or nature whatsoever, whether direct or indirect, or consequential, absolute or contingent, and whether based on any federal or state laws or other statutory regulations, including, without limitation, claims under law, admiralty or equity, and whether based in common law, contract, tort, strict liability, negligence

(irrespective of the negligence, except the gross negligence, of the party being indemnified) or otherwise, arising from:

(A) The relocation and/or augmentation of the Highline as described in Section 2(a) hereof, and/or the post-railbanking restoration and removal as described in Section 2(b) hereof;

(B) CSXT's cooperation with the City and/or ESDC in the City's and/or ESDC demolition, removal, or other physical or legal disposition of the Highline or within the Highline as described, respectively, in Sections 2(a) and (b) hereof;

(C) The City's and/or ESDC's demolition, removal or other physical or legal disposition of the Highline as described in Section 2(d) hereof;

(D) Any ruling, decision, determination or other obligation arising after the date hereof by which CSXT shall be required to undertake the demolition, removal, or other physical or legal disposition of the Highline as described in Section 2(d) hereof;

(E) Any legal proceeding or other action or dispute relating to the Highline as described in Section 2(f) hereof;

(F) Any breach of this Agreement by the City and/or ESDC.

(h) Notice of Claims: Indemnification Procedures. Upon receipt of notice by CSXT (or by CSXT on behalf of one or more CSXT Affiliates), as applicable, of any loss, event, happening or occurrence which would be the basis of a claim by CSXT (or one or more CSXT Affiliates) under the provisions of this Agreement (an "Indemnified Claim"), CSXT shall immediately provide written notice to both the City and ESDC of such Indemnified Claim. The City (or ESDC, if agreed with the City by separate agreement) shall retain sole responsibility for the cost of, and primary responsibility for the conducting of, any legal and/or administrative action or other proceeding regarding any such Indemnified Claim (an "Indemnified Claim Proceedings") and the defense (and any appropriate appeal) thereof. Nothing contained herein shall in any way limit CSXT's right to participate and/or retain independent legal counsel, at CSXT's expense, with respect to any Indemnified Claim Proceeding, but CSXT shall cooperate with the City and the ESDC, as the case may be, and coordinate CSXT's participation and/or use of such independent counsel in a matter not inconsistent with City's positions and interests in such Indemnified Claim Proceeding, to the extent reasonably possible and not adverse to the interests of CSXT. City's or ESDC's obligation to conduct and undertake any required Indemnified Claim Proceeding or the defense (or appeal) thereof, and to bear the costs incurred with respect thereto, shall apply even in the event that there is an ultimate adjudication or other determination of liability of CSXT attributable to the negligence, gross negligence, willful misconduct or other tortious conduct of CSXT. Any settlement of an Indemnified Claim shall be subject to

the written approval of both CSXT and the City (and/or ESDC, as the case may be), not to be unreasonably withheld or delayed. Indemnification payment shall be made within ninety (90) days of such approval.

(i) Survival. The terms, covenants and conditions of this Section 2 shall survive the surrender or other termination of the CITU and the termination of this Agreement.

3. INSURANCE

In addition to any other insurance the City and ESDC may obtain or carry with respect to the Highline, unless the CITU is in full force and effect (in which event the City and ESDC shall not be under the following insurance obligation), the City and ESDC shall each, to cover each's respective portion of the Viaduct, purchase and maintain Railroad Protective Liability Insurance ("RPL"). Said RPL policy shall be written on the form prescribed in the Federal Aid Highway Program Manual, Volume 6, Chapter 6, Section 2, Subsection 2, as amended from time to time, or as superseded by the AAR/AAHSTO form, or on an ISO/RIMA form, and shall provide available limits of not less than \$1,000,000 per occurrence, \$5,000,000 aggregate for bodily injury and property damage. Such policy shall provide that the insurance not be canceled, non-renewed or coverage materially reduced unless thirty (30) days advance notice is given to NYCLLC. The original of said RPL policy shall be furnished to and approved by Risk Management Department, CSX Corporation, 500 Water Street (J907), Jacksonville, Florida 32202, prior to the commencement of any entry upon the Highline or other operations under this Agreement. Acceptance and approval of RPL insurance shall be at the sole discretion of said Risk Management Department. If either the City or ESDC fails to provide CSXT with such policy, CSXT may obtain such coverage and the cost of such coverage shall be reimbursed to CSXT on demand. CSXT agrees that the City may add to its RPL policy, as additional insureds, the private property owners or any of them whose real estate is encumbered by the Highline, *provided, however*, that no failure of the City to add or to name correctly any such private property owner shall invalidate or otherwise affect coverage of the primary insured, CSXT.

4. NOTICES

General. Unless otherwise provided herein, all notices, communications and deliveries required or permitted under this Agreement shall be in writing and shall be (a) delivered personally, (b) sent by facsimile transmission with subsequently transmitted confirmation of receipt, (c) sent by overnight commercial air courier (such as Federal Express), or (d) mailed, postage prepaid, certified or registered mail, return receipt requested; to the parties at the following addresses or facsimile numbers or at such other address(es) or facsimile number(s) of which a party shall have duly notified the other party:

CSXT:

CSX Transportation, Inc.

500 Water Steet (J-910)
Jacksonville, FL 32202
Attention: Stephen Crosby
Facsimile No. (904) 633-4531

City of New York:

The City of New York
City Hall
New York, New York 10007
Attention: Deputy Mayor for
Economic Development and Rebuilding
Fax: (212) 788-2867

With copy to:

New York City Economic Development
Corporation
110 William Street
New York, New York 10038
Attention: Executive Vice President,
Property Management
Fax: (212) 312-3919

With copy to:

New York City Law Department
Attn: Chief, Economic Development
Division
Office of the Corporation Counsel
100 Church Street, 6th Floor
New York, New York 10007-2601
Fax: (212) 227-5648

ESDC:

Empire State Development Corporation
633 Third Avenue
New York, New York 10017
Fax: () -

With copy to:

Fax: () -

Any such notice, communication or delivery shall be deemed delivered upon the earliest to occur of. (a) actual delivery; (b) the same day as facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday), (c) one (1) business day after shipment by commercial air courier as aforesaid; or (d) three (3) business days after certified or registered mailing as aforesaid.

5. **GENERAL TERMS**

(a) Entire Agreement. This Agreement, and any exhibits or amendments which may be attached hereto from time to time, constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and may be modified only by a writing executed by both parties.

(b) Incorporation by Reference. This Agreement, as amended by the parties hereto from time to time in accordance herewith, shall be incorporated by reference into any separate finance agreement or other related documents between the parties hereto, and such incorporation shall include all amendments and exhibits hereto, even if made or attached subsequent to the date of this Agreement.

(c) No Third Party Beneficiaries. Except as otherwise provided herein, nothing contained in this Agreement, in any provision or exhibit hereof, or in any agreement or provision included herein by reference, shall operate or be construed as being for the benefit of any third person.

(d) Interpretation. Neither the form of this Agreement, nor any provision herein, shall be interpreted or construed in favor of or against either party hereto as the sole drafter thereof.

(e) [intentionally deleted]

(f) Parties. Wherever used herein, the terms "CSXT" and "the City" and "ESDC" shall be construed in the singular or plural as the context may require or admit, and shall include the permitted successors and assigns of such parties.

(g) Severability. This Agreement is executed under the current interpretations of applicable federal, state, county, municipal and local statutes, ordinances and laws. However, each separate division (section, paragraph, clause, item, term, condition, covenant or agreement) hereof shall have independent and severable status for the determination of the legality thereof. If any separate division is determined to be void or unenforceable for any reason, such determination shall have no effect upon the validity or enforceability of each other separate division, or any combination thereof.

(h) Governing Law. This Agreement shall be construed and governed under the laws of the State of New York, exclusive of the conflicts of laws provisions. It is the particular intent of the parties that all waiver, release and indemnity obligations provided herein, including those relating to punitive and/or exemplary damages, shall be enforceable to the extent permitted by law.

(i) Assignability.

(i) The City and the ESDC may assign this Agreement or transfer any right or interest herein, subject to any applicable STB approval, without the prior written consent of CRC; provided that no such assignment or transfer shall relieve the City or ESDC of its obligations under this Agreement or any other document or instrument between the City and/or ESDC on the one hand and CSXT or any CSXT Affiliate thereof on the other, and provided that the

assignee assumes the obligations of the City or ESDC, as applicable, under this Agreement.

(ii) CSXT may, in its discretion, assign this Agreement in whole or in part, or any rights or interests of CSXT hereunder, to any CSXT Affiliate or any entity in connection with any merger or consolidation of CSXT or any CSXT Affiliate thereof, and in such event such CSXT Affiliate shall be deemed to assume the obligations of CSXT hereunder.

(j) Time is of Essence. Time is of the essence in the performance of each party's obligations under this Agreement.

(k) Incorporation of Exhibits. All exhibits attached to this Agreement are incorporated by this reference and made a part of this Agreement for all purposes.

(l) Multiple Counterparts. This Agreement may be executed in several counterparts each of which shall be deemed an original, and such counterparts shall constitute one and the same instrument.

(m) WAIVER OF JURY TRIAL. CSXT AND THE CITY AND ESDC EACH HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHT ANY OF THEM MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY DOCUMENTS CONTEMPLATED TO BE EXECUTED IN CONNECTION HERewith OR ANY COURSE OF CONDUCT, COURSE OF DEALINGS, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS, RIGHTS OR OBLIGATIONS OF EITHER PARTY ARISING OUT OF OR RELATED IN ANY MANNER TO THIS AGREEMENT (INCLUDING, WITHOUT LIMITATION, ANY ACTION TO RESCIND OR CANCEL THIS AGREEMENT OR ANY CLAIMS OR, DEFENSES ASSERTING THAT THIS AGREEMENT WAS FRAUDULENTLY INDUCED OR IS OTHERWISE VOID OR VOIDABLE). THIS WAIVER IS A MATERIAL INDUCEMENT FOR THE PARTIES TO ENTER INTO AND ACCEPT THIS AGREEMENT.

(n) Authorization. CSXT and the City and ESDC each represent and warrant to the other parties hereto that each has obtained all necessary corporate approvals authorizing the execution and delivery of this Agreement, and that the execution and delivery of this Agreement does not violate the articles of incorporation or bylaws of such corporation, and will not constitute a material breach of any contract by which such corporation is bound.

(o) Recording. This Agreement shall be recorded, by CSXT and by ESDC, each against its respective property segment of the Highline, at the City's sole cost and expense, in the Office of the Recorder of Deeds in and for the City of New York.

(p) Termination. The Agreement shall terminate upon the earlier of (i) issuance of an order of abandonment by the STB for the (entire) Highline; and (ii) reinstitution of rail service on the Highline.

EXECUTED as of the date first herein written.

Witness:

CSX TRANSPORTATION, INC.

By: _____

Name: _____

Title: _____

Witness:

THE CITY OF NEW YORK

By: _____

Name: _____

Title: Deputy Mayor for Economic
Development and Rebuilding

Approved as to form:

By: _____

Name:

Acting Corporation Counsel

Witness:

**NEW YORK STATE URBAN
DEVELOPMENT CORPORATION,
d/b/a/ EMPIRE STATE
DEVELOPMENT CORPORATION**

By: _____

Name: _____

Title: _____

EXHIBIT A -1
Easements

EXHIBIT A-2
1929 Agreements

EXHIBIT A-3
Property-Specific Easements

EXHIBIT A-4

[Descriptions of all 26 or more Highline-Encumbered Properties]

EXHIBIT B-1
Quitclaim Deed to City

EXHIBIT B-2
Quitclaim Deed to ESDC

EXHIBIT C

CITU

EXHIBIT D

Statement of Willingness To Assume Financial Responsibility

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29, the City of New York, a municipal corporation, (Interim Trail User) is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way owned by CSX Transportation, Inc. The property, known as West 30th Street Secondary Track and also known as the Highline, extends from railroad milepost ____ near 75-95 Gansevoort Street and runs northerly and westerly to railroad milepost ____ near 547-55 West 34th Street and the West 34th Street streetbed, identified as Line Code 4225 in the records of the United States Railway Association and identified as Section 2, Block 82204, Lot 11 on the Tax Map for the Borough of Manhattan, a distance of 1.53 miles in the County and State of New York. The right-of-way is part of a line of railroad proposed for abandonment in Docket No. STB AB-167 (Sub No. 1094).

A map of the property depicting the right-of-way is attached.

The City of New York and the Empire State Development Corporation each acknowledge that use of the right-of-way is subject to the user's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad(s) on the same date it is being served on the Board.

CITY OF NEW YORK

By: _____

**NEW YORK STATE URBAN DEVELOPMENT
CORPORATION, d/b/a/ EMPIRE STATE
DEVELOPMENT CORPORATION**

By: _____